No. 439.

Brf. of Moffat for P. C.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1899.

Filed Jan. 10, 1900.

No. 439.

THE ADIRONDACK RAILWAY COMPANY,
Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR.

R. BURNHAM MOFFAT,
Counsel.

KINGSTON ROSSEVELTCH CO., 65 DUANE ST., N. Y.

Supreme Court of the United States.

ADIRONDACK RAILWAY COMPANY,
Plaintiff in Error,

AGAINST

THE PEOPLE OF THE STATE OF NEW YORK,
Defendants in Error.

October Term, 1899.
No 439.

The case comes before this Court on writ of error to the Court of Appeals of the State of New York, allowed by Hon. ALTON B. PARKER, Chief Judge thereof. Owing to the importance of the questions involved, the cause was advanced by order of this Court made December , 1899, and was set for hearing on January 8, 1900.

Abstract of the Case.

Suit was brought by defendants in error in the Supreme Court of the State of New York, to enjoin perpetually the plaintiff in error, a railroad corporation of that State, from continuing certain condemnation proceedings theretofore instituted by it for the acquisition of its right of way over a tract of land in Hamilton County, New York, known as Township 15, Totten and Crossfield's Purchase, on the ground that the State of New York had become seized of the fee of the particular strip across said Township, six rods wide, whereon plaintiff in error had located its line. The State claimed to have acquired the fee of such strip either by voluntary grant from the owners or by

virtue of proceedings which it had taken for the condemnation or seizure thereof under the provisions of Chapter 220 of its Laws of 1897, (Record, pp. 5-7), and insisted that by virtue of the provisions of Article 7 of Section 7 of its Constitution, which went into effect on January 1, 1895, the plaintiff in error had no power whatsoever to acquire a right of way over such strip. The constitutional provision relied upon reads as follows:

> "The lands of the State, now owned or hereafter acquired, constituting the Forest Preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be removed or destroyed."

Not only Township 15, but all of Hamilton County lay wholly within the Forest Preserve as fixed by law at the time said constitutional provision went into effect (Record, p. 31).

The owners of the land, having been parties defendant to the condemnation proceedings which it was sought to enjoin, were made parties defendant in this suit by the State; but none of them appeared or answered and the issues presented by the complaint were contested only by the Railway Company, the plaintiff in error herein (Record, p. 31).

The Railway Company's answer (1) denied that the State had ever acquired the title to such strip, either by grant or by condemnation, *except* as subject to the right of plaintiff in error to construct, maintain and operate its railroad thereover; (2) insisted that the condemnation features of the Act of 1897 under which the State justified its claim of title by seizure, were in any event unconstitutional and void in that they authorized the taking of private property by the State without due process of law, and therefore in violation of the provisions of the State Constitution (Record, p. 36) and of the Fourteenth Amendment to the Constitution of the United States (Record, p. 37); (3) insisted that in so far as any proceedings had under the condemnation features of the Act of 1897 could be held to vest a title to said strip in the State, exclusive of the right of plaintiff in error to construct, maintain and operate its railroad thereover, those features of the act were unconstitutional and void in that

they authorized the taking of private property for an alleged public use without the making of any compensation whatsoever therefor, in direct violation of section six of Article One of the State Constitution (Record, p. 36) and of the Fourteenth Amendment to the Constitution of the United States which prohibits any State from denying to any person within its jurisdiction the equal protection of its laws or of depriving any person of his property without due process of law (Record, p. 37); and (4) insisted that said Act of 1897, in so far as it authorized the condemnation of said strip by the State, to the exclusion of the right of plaintiff in error to construct, maintain and operate its railroad thereover, was unconstitutional and void, as violating the provisions of section ten of Article One of the Federal Constitution (Record, p. 37), in that it impaired the obligation of a contract then existing between the State and this plaintiff in error.

There has been no dispute of fact between the parties to this litigation on any point at all material to the questions involved. The case was tried at Special Term, Albany County, before Mr. Justice CHESTER, who granted the relief prayed for, and judgment was entered accordingly (Record, pp. 38-39). He handed down an opinion which is printed at pages 40-42 of the Record, and which, it will be seen, declines to discuss the constitutional questions presented.

The Railway Company appealed to the Appellate Division, which reversed the judgment of Special Term, and ordered a new trial (Record, p. 74). The prevailing opinion was written by PARKER, P. J., who, relying upon three well settled and unambiguous decisions of the Court of Appeals which had stood unquestioned for a period of ten years or more and had been universally followed and regarded as the law of the State,—decisions holding that upon a railway company's doing what it was shown this plaintiff in error had done, the land was impressed with a lien in favor of its right to construct which would ripen into title upon purchase or condemnation,—held that in so far as the State took the strip by voluntary grant it took it subject to such lien or right, and in so far as it claimed title by condemnation it had condemned only as against the owner and had therefore acquired only what the owner had, namely, the

fee of the land subject to such lien or right in the railway company (Record, pp. 75-77). Justices LANDON and MERWIN concurred, Justice HERRICK alone dissenting; and he wrote a long dissenting opinion which is printed at pages 77-92 of the Record. Justice HERRICK, too, (p. 92) refrained from discussing the questions raised as to the constitutionality of the Act of 1897, resting his dissent wholly upon *his* view of the situation, namely, that the railway company had not acquired, by what it was shown to have done, any right to condemn its located line or indeed any property right of any kind which the State was bound to respect.

The defendants in error thereupon appealed to the Court of Appeals, giving the stipulation required by the State Constitution (Appendix to Brief, p. 2) that in the event of the order of the Appellate Division being affirmed judgment absolute might be entered against them (Record, p. 74).

Judge VANN wrote the opinion in the Court of Appeals concurred in by all the judges. It will be found at pages 93-106 of the Record. He devoted himself almost wholly to the question of the constitutionality of the Act of 1897, and pronounced it valid. He held that plaintiff in error had acquired, by what it had done, no property right of any kind which was good as against the State; and he ran away (and we are willing after further deliberation to concede quite properly so, although in our opinion he ran too fast and too far) from the three aforementioned decisions of that Court, upon which we had relied in our arguments below. Those decisions will be discussed hereafter.

Statement of Facts.

In 1863, an act was passed by the legislature of the State of New York, entitled:

> "AN ACT to encourage and facilitate the construction of a railroad along the valley of the upper Hudson into the wilderness in the northern part of this State, and the development of the resources thereof." (*Laws 1863, Chap. 236.*)

By this act, Albert N. Cheney and his associates were authorized to make and file articles under the then general railroad law of the State (*Laws 1850, Chap. 140*), "*for the purpose of* "constructing and operating a railroad from some point in the "county of Saratoga up and along the valley of the upper Hud- "son into the wilderness in the northern part of the State" (Appendix to Brief, p. 28).

By section 2 of the Act certain tax exemptions and other privileges were granted the corporation so to be formed, which, however, have no direct bearing on the questions now before the Court. Section 3 provided for an annual report, and section 4 gave to the company so to be formed still other privileges having no direct bearing on the matters under consideration. The remaining sections, 5, 6 and 7, dealt with the time of completion which also is unimportant in view of the extensions subsequently granted by the legislature (Appendix to Brief, pp. 30-36).

Under this act, a company known as the "Adirondack Company" was incorporated on October 24th, 1863, and at once commenced the construction of its railroad, and the utilization of the other privileges granted (Record, p. 71).

In 1865, another act was passed, entitled:

> "An Act to authorize the Adirondack Company to extend its railroad to Lake Ontario or River St. Lawrence, and to increase its capital stock." (*Laws 1865, Chap. 250.*)

Under this act, authority to amend its articles of association was granted the Adirondack Company so as to enable it, under the general law, to extend its road as in the title of the act set forth and to increase its capital stock by not more than $5,000,000 additional (Appendix to Brief, p. 30).

The original articles of association had fixed the northerly terminus of the road in the town of Newcomb, Essex County, which this Court will judicially note is beyond and to the northeastward of and further in the wilderness than is Township 15, Hamilton County. Under the authority conferred by the Act of 1865, the Adirondack Company on March 1st, 1871, amended its articles so as to fix as its northerly terminus "a point on the "St. Lawrence River in the town of Oswegatchie in the County

" of St. Lawrence, making the whole length of its railroad, in-
" cluding such extensions, as near as may be, 185 miles of rail-
" road line passing through and into the counties of Warren,
" Essex and Hamilton," among others; and it increased its capital stock (Record, p. 71). Ogdensburgh was the objective point, described as " a point on the St. Lawrence River in the town of Oswegatchie in the County of St. Lawrence."

Sundry other acts of the legislature were passed for the relief of the Adirondack Company, granting it right to build branches, extending time of completion, etc., etc., which it is unnecessary here to note. They will be found in the Appendix to this Brief.

On July 1st, 1872, and pursuant to the authority conferred by subd. 10 of §28 of the then general railroad law (*Laws 1850, Chap. 140,*—see Appendix to Brief, p. 6) the Adirondack Company executed a mortgage to the trustees named therein of " all and singular its railroad, and property connected there-
" with, together with the rights, privileges, franchises and im-
" munities of said Adirondack Company " to secure the payment of its bonds to be issued thereunder (Record, p. 71).

The bonds were issued and some years later and upon default in payment of the interest thereon foreclosure was had; and by decree entered June 28th, 1881, a sale of the whole of the property, rights and franchises covered by said mortgage was directed (Record, p. 71). A sale was had pursuant to the decree and by referee's deed dated October 21st, 1881, the purchasers acquired title to all the " railroad, mortgaged lands and other
" property, franchises, privileges, easements, rights, immunities
" and liberties of said Adirondack Company covered by or in-
" cluded in said mortgage " (Record, p. 71).

Pursuant to the authority conferred by *Laws 1873, Chap. 469; Laws 1874, Chap. 430;* and *Laws 1876, Chap. 446,* relating to the reorganization of railroads sold under mortgage and the formation of new companies in such cases (Appendix to Brief, pp. 9-18), the purchasers organized the plaintiff in error herein, the Adirondack Railway Company. The certificate was dated June 30th, 1882, and was filed and recorded in the office of the Secretary of State on July 7th, 1882. It provided that the life of the new corporation should be one thousand

years; that its railroad constructed and to be constructed should extend from a point in the town of Saratoga Springs, in the county of Saratoga, to a point in the town of Hadley, in said county of Saratoga, and thence up and along the valley of the upper Hudson to the town of Newcomb in the county of Essex, and thence to the River St. Lawrence at or near the city of Ogdensburgh; that the length of the road was to be 185 miles; and that the counties of the State through and into which the road was and was to be built were Saratoga, Warren, Essex, Hamilton, Franklin and St. Lawrence (Record, p. 72).

At the time of the foreclosure sale the Adirondack Company had constructed and was operating its line from Saratoga Springs to a point in the town of Hadley and thence up and along the valley of the upper Hudson as far as North Creek in Warren County,—a distance of sixty miles (Record, p. 19). The Court will note that this deposition was read in evidence as proof of the facts therein deposed to (See Record, p. 72).

It will thus be seen that upon the filing of said certificate by the purchasers at foreclosure and their associates, the Adirondack Railway Company, the plaintiff in error herein, became under *Laws 1876, Chap. 446*, and was "vested with and entitled "to exercise and enjoy, all the rights, privileges and franchises" which at the time of the foreclosure sale belonged to or were vested in the Adirondack Company or its receiver, and was subject to all the provisions, duties and liabilities imposed by the general railroad act of 1850 except so far as said provisions, duties and liabilities might be inconsistent with the Act of 1876, *and with the rights, privileges or franchises formerly belonging to the Adirondack Company* (Appendix to Brief, p. 14).

Laws 1873, Chap. 469, which had never been repealed (See Appendix to Brief, p. 9), provided that upon the filing of such certificate, the body politic and corporate so formed "shall "exist for the time, and may and shall possess, exercise and "enjoy, all the powers, privileges, rights, liberties, easements "and franchises possessed by the said former corporation, and "in the same manner, and to the same extent, and with the "same force and effect as the same could have been exercised by "the said former corporation, had not such sale as aforesaid "been made."

By the act of 1876 last referred to, which amended certain sections of chapter 430 of the laws of 1874, the reorganized company while possessing all the rights, privileges and franchises of the original company was expressly declared to be subject to all the provisions, duties and liabilities imposed by the general railroad act of 1850 and of the acts amendatory thereof, except in so far as the same might be inconsistent, among other things, with the provisions of the act of 1876. Now, in 1867, the general railroad act had been amended by an act (*Laws 1867, Chap. 775*) which provided that if any corporation formed under the general law of 1850 should not finish its road and put it in operation within ten years from the time of filing its articles of association, its corporate existence *and powers* should cease (Appendix to Brief, p. 7).

The Adirondack Railway Company thus became obligated by law to finish its road and put it in operation prior to July 7th, 1892, on pain of losing its corporate existence and powers.

In 1889, however, an act was passed (*Laws 1889, Chap. 236*) which added a new section to Chapter 430 of the Laws of 1874 relating to the reorganization of railroads sold under mortgage and providing for the formation of new companies in such cases. The section so added read:

> "Nothing herein contained shall be construed to compel a corporation organized under this act to extend its road beyond the portion thereof constructed at the time said corporation acquired title to such railroad property and franchise, provided the board of railroad commissioners of the State shall certify that in their opinion the public interests under all the circumstances do not require such extension. If said board shall so certify and shall file in their office such certificate (which certificate shall be irreversible by said board) said corporation shall not be deemed to have incurred any obligation so to extend its road and such certificate shall be a bar to any proceedings to compel it to make such extension or to annul its existence for failure so to do, and shall be final and conclusive in all courts and proceedings whatever. Nothing herein contained shall be construed to authorize the abandonment of that portion of a railroad which has been constructed and operated." (Appendix to Brief, p. 18.)

Upon the adoption of the new General Railroad Law on June 7th, 1890 (*Laws 1890, Chap. 565*), the provisions of the act of 1889 above quoted were embodied therein, substantially without change, as Section 83 (Appendix to Brief, p. 23).

Availing itself of the relief afforded by this Statute, the Adirondack Railway Company in April, 1892, made application to the Board of Railroad Commissioners for a certificate relieving it from the obligation or necessity of then completing the extension of its said line; and on May 9th, 1892, the Board issued its certificate certifying that in its opinion the public interests, under all the circumstances, did not require the extension of the road beyond the portion thereof constructed at the time the company acquired title to said railroad property and franchises, namely, beyond North Creek in Warren County (Record, p. 19; this deposition read in evidence, p. 72 of the record).

It thus appears that in 1896 and 1897 when,—the conditions having materially changed and it being then of manifest interest to the public as well as to the railroad that the line should be extended (Record, pp. 19-21, 15-16; see also p. 72),—the plaintiff-in-error made its surveys, acquired by purchase sundry portions of its right of way and prepared to acquire other portions by condemnation, *it possessed intact all the rights, franchises, grants and privileges incident to the construction, maintenance and operation of its line beyond North Creek that the old Adirondack Company had possessed at the time of the foreclosure sale;* and that in so far as any of those franchises and grants partook, prior to foreclosure, of the nature of a binding contract between the State and the Adirondack Company, they were just as binding in 1897 between the State and this plaintiff in error. This proposition will be discussed at length under its proper head in the Argument; suffice it here to say that in our opinion the company was clearly vested with an absolute right granted by the State and binding upon the State with all the obligatory force of a contract, to construct and operate its railroad from North Creek, which it had already reached, to a point in the Town of Newcomb, Essex County, and thence to a point on the River St. Lawrence in the Town of

Oswegatchie; and was further vested with the right of acquiring by eminent domain, such lands as might be necessary therefor.

It was shown in the evidence above referred to and without dispute that by constructing as far as Long Lake in Hamilton County,—a distance of approximately forty miles,—the line could there connect with a new and continuous line of railway coming down from the North whereby direct communication could be had with Ogdensburgh, and by means of a new international railway bridge across the St. Lawrence River constructed under Act of Congress and a new line of railway connecting therewith in Canada, the City of Ottawa would be directly connected with tide water at the Hudson by a route which not only would be shorter by fifty or sixty miles than any existing line, but would also have the immeasurable advantage of being readily able to cross the St. Lawrence at all seasons and thereby avoid the delays and dangers incident to the flow of ice affecting the ferry from Ogdensburgh to Prescott.

The *procedure* whereby the plaintiff in error could exercise this vested right of acquiring its right of way, in the construction of its line beyond North Creek, was of course in the discretion of the legislature, and could be changed by the legislature from time to time under its reserved powers. We therefore look at the law as it existed in 1896 and 1897, when the plaintiff in error proceeded to exercise such right, and find it in the General Railroad Law of 1890 (Appendix to Brief, pp. 20-23).

Section 6 of that act reads:

> "Every railroad corporation, except a street surface railroad corporation and an elevated railway corporation, before constructing any part of its road in any county named in its certificate of incorporation, or instituting any proceedings for the condemnation of real property therein, shall make a map and profile of the route adopted by it in such county, certified by the president and engineer of the corporation, or a majority of the directors, and file it in the office of the clerk of the county in which the road is to be made. The corporation shall give written notice to all actual occupants of the lands over which the route of the road is so designated, and which has not been purchased by or given to it, of the time and place such map or profile

were filed, and that such route passes over the lands of such occupants." (Appendix to Brief, pp. 20-22.)

The Statute then provides that from and after the service of such notice upon the occupants, *the hands of the railroad company shall be completely tied for a period of fifteen days.* It can do nothing during that time to perfect or hasten its acquisition of title. During such period the occupant or owner may, if he so desires, petition the Court for an alteration of the route adopted by the railroad company as shown on its map so filed, and in case any such proceeding be brought, further action by the company is deferred until final order be entered in that proceeding. The fifteen day period is imposed by statute for the exclusive benefit of the owner, and if he does not therein move to change the location of the road, the line shown on the map becomes at the expiration of said fifteen days a fixed and located line. Up to that time it had been located but with the possibility of the location being changed; after that the location becomes certain. What was intangible before, not as to the existence of the *right* to take the land but as to the precise land to be taken, then becomes tangible and fixed in every respect.

The fifteen day period is not given to enable the land owner to *defeat* the right of the company but to permit him to reduce, if he can, the hardship of the taking. See

People ex rel. Erie R. R. v. *Tubbs* (59 Barb., 401, 407),

where it is said:

> "This proceeding was obviously designed, not to put it in the power of a few individuals to obstruct and defeat the construction of railroads, but to give a remedy to a land-holder who might sustain some extraordinary or peculiar injury from the proposed location, not common to other lands through which the proposed route lay, which could not be adequately compensated in damages, and which might be prevented and avoided by a change upon the land consistently with the just rights of both parties, and of the public."

This also appears from the following language used further on in the same section of the Railroad Law last quoted:

> "But no alteration of the route shall be made except

> by the concurrence of the commissioner who is a practical civil engineer, nor which will cause greater damage or injury to lands, or materially greater length of road than the route designated by the corporation, *nor which shall substantially change the general line adopted by the corporation.*"

It is apparent, therefore, that this provision of the Statute for the benefit of the land owner was never intended to and that it cannot be held to qualify or limit in any way the *right* of the company to take the land required for the purposes of its incorporation.

That the legislature further intended to give to railroad companies the absolute *right* to locate the line of their roads over such routes between their stated termini as they might select, and to acquire title to the lands over which such located routes might pass, is apparent from Sections 13 and 28 of the railroad act of 1850.

Section 13 reads:

> " In case any company formed under this act is unable to agree for the purchase of any real estate required for the purposes of its incorporation, it shall have the right to acquire title to the same in the manner and by the special proceedings prescribed in this act." (See Appendix to Brief, p. 5.)

And Section 28 provides that in addition to the general powers conferred on corporations by Chapter XVIII., Title 3, of the Revised Statutes (see Appendix to Brief, p. 3), each corporation formed under the provisions of said railroad act should have power:

> " 1. To cause such examination and surveys for its proposed railroad to be made, as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers or agents and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto;" and
> * * * *
>
> " 4. To lay out its road not exceeding six rods in width, and to construct the same; and for the purposes of cuttings and embankments, to take as much more land as may be

necessary for the proper construction and security of the road, and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided in this act for lands taken for the use of the company." (Appendix to Brief, p. 6.)

The Adirondack Company, it will be recalled, was incorporated with these rights *going to the very essence of the purposes for which it was incorporated*, and all such rights were acquired by the plaintiff in error herein upon its formation in 1882.

The provisions of the act of 1850 above quoted were embodied in the Railroad Law of 1890, without material change, as Sections 7 and 4 thereof, respectively (Appendix to Brief, pp. 23, 20).

Upon the expiration of the fifteen day period,—and it was admitted on the trial herein that no application to change the route across Township 15 adopted by the plaintiff in error has ever been made by owner or by occupant or otherwise (Record, p. 64),—the railroad company's right to condemn,—*right of action*, if you please,—was complete, and it could then proceed to acquire title by condemnation in the manner pointed out by Statute. Until 1890, when the so-called "Condemnation Law" was enacted (*Laws 1890, Chap. 95*) the procedure for the condemnation by a railroad of its right of way was found in Sections 14-18 of the railroad act of 1850, and in the sundry acts amendatory thereof. In 1890, however, and upon the enactment of a new general Railroad Law, those provisions were inserted without substantial change in a separate act entitled the Condemnation Law, which act was also added as a new and distinct chapter to the then existing Code of Civil Procedure. There was substantially no change made in the procedure for condemnation, but simply a reclassification of the subject under two heads instead of one. The emphasis, consequently, placed by the learned judge writing the opinion at the Court of Appeals upon the fact that the proceedings for filing the map and giving notice to occupants were authorized by the Railroad Law whereas proceedings for the acquisition of title by condemnation were authorized by the Code of Civil Procedure, does not seem to have been well considered (Record, p. 104).

While we have printed in the Appendix to our Brief the more important provisions of the general condemnation law of 1890, we wish to point out that such provisions have no bearing whatsoever on the questions involved. We do not claim and we have never claimed that our right to defeat this action brought by the State rests in any particular upon the time when we began our *condemnation proceedings,* or upon any question of priority on October 7th, 1897, between the commencement of our condemnation proceedings and the condemnation by the State under the Act of 1897. Upon the trial at Special Term before Justice CHESTER when a witness for the plaintiffs testified to what we knew was untrue, namely, as to the hour when the State filed and served its certificate of seizure under the Act of 1897, we naturally introduced evidence to show the true hour; but so far from regarding such issue as at all material, we conceded in our argument and in our brief at Special Term, in our argument and brief at Appellate Division and in our argument and brief in the Court of Appeals, and we state here with all the clearness and emphasis of which we are capable,—that the time when we began our *condemnation proceedings* of the strip across Township 15 has absolutely no bearing of any kind upon the questions involved on this appeal. We stand or fall upon our rights as they were at daybreak of October 7th, 1897; and the State does not claim to have filed or served its certificate of seizure prior to 11:50 that morning (Record, p. 55). We say at daybreak, because the rights we assert were complete upon the expiration of fifteen days after the filing of the maps and giving notice thereof to the occupants, and such fifteen day period expired with midnight of October 6th, 1897. Lest we be misunderstood, however, we add here further that our rights were indestructible by the State even before the expiration of that period; but of this more under its proper head in the argument.

Such conflict of testimony as to the hour of the State's action, —whether it acted at 11:50 a. m. or at 12:45 p. m.,—was substantially the only conflict in the evidence. We naturally do not ask this Court to regard it; we have never founded any right in any of the courts upon a determination of such conflict in our favor; and we raise no question as to the propriety of Judge VANN's assumption at the middle of page 97 of the Record that "the condemnation proceedings instituted by the forest pre-

serve board were fully completed as required by the statute of 1897 before " any *condemnation proceedings* were commenced by the plaintiff in error, although the formality with which the learned judge has announced such assumption might, without the above explanation, have possibly led this Court into regarding the assumption as weighing most heavily against the railway company's contention as to its rights.

Now what are the detailed facts established by the evidence?

Township 15, Totten & Crossfield's Purchase, lies at the point of contact of Warren, Hamilton and Essex Counties, a portion of said township lying in each of said counties (Record, p. 17; see also p. 72).

Between September 1st, 1896, and June 1st, 1897, the plaintiff in error caused a survey to be made (Record, pp. 16, 72) preparatory to the construction of its line from North Creek to the town of Newcomb in Essex County and thence to the outlet at the northern extremity of Long Lake in Hamilton County, where connections could be made with the new line of railway being constructed from the north as hereinbefore referred to (Record, pp. 15-17). The region is mountainous, and the course of the route as adopted was necessarily a winding one. A portion of such route crosses Township 15, and enters into each of said three counties within the limits of said Township. The lands are wild lands, no portion of the route adopted in said township being under cultivation (Record, p. 17); and there was no " actual occupant " thereof within the meaning of the Statute.

It also acquired by purchase,—a very material fact quite overlooked by the learned Court below (Record, p. 165),—portions of its said right of way in other townships over which its route as adopted passes (Record, pp. 18, 21; see also 72), and sought to acquire from the owners, by purchase, its right of way over Township 15 also (Record, p. 14).

It thus appears affirmatively that relying upon its vested right or franchise, acquired by an accepted grant from the State, to carry out the very purposes of its incorporation and construct its line to Newcomb in Essex County and thence to Long Lake on the way to Ogdensburgh, the plaintiff in error ex-

pended divers sums of money in making a survey and in *purchasing* rights of way wherever it could do so. This fact was established by competent proof and was unquestioned; and the assumption by the learned Court below, in the face of such evidence, that the plaintiff in error had taken no action and expended no money to extend its road when the State acted (Record, p. 102), had done nothing beyond filing a map and profile and serving notice thereof on the occupants (Record, p. 105), was an error of law most material in its bearing, and has been specially assigned as error to this Court (See 8th Assignment of Error, p. 109).

Failing in its efforts to acquire its right of way across Township 15 by purchase, the plaintiff in error caused to be filed in the office of the clerk of each of said counties on *September 18th, 1897*, a map and profile of its route so adopted, duly certified as required by statute (Record, p. 14), and at once proceeded to serve notice upon the *owners,*—although it might well be urged that as there were no "occupants" whatsoever of the wild land of which said township consists, the plaintiff in error was wholly freed from any statutory obligation to serve notice of filing upon anyone.

The owners were served as follows (Record, p. 65):

On September 21st: *McGinn* (owning an undivided *fourth* part of said township;—Record p. 46); *D. J. Finch* (owning an undivided *eighth* part thereof;—Record, p. 47);

On September 23rd: *Ashley* (owning an undivided *fourth* part thereof;—Record, p. 46); *Hitchcock* (owning an undivided *eighth* part thereof;—Record, p. 45); and

On October 1st: *J. W. Finch* (owning the remaining undivided *fourth* part thereof;—Record, p. 45).

The fifteen day period was thus set running on September 21st, and consequently expired at midnight on October 6th.

The evidence shows that notices of filing were at the same time served on the Glens Falls Paper Mill Company and on the

Indian River Company (Record, p. 65); but it also showed that prior to October 7th, 1897, no actual delivery had been made of any deed from these owners, all the deeds having been executed for the purposes of effecting a sale of the entire township to the State by a conveyance thereof from the Indian River Company, and were to be delivered only when that sale was accomplished.

Mr. Ashley who prepared the deeds testified that he placed them in the custody of Mr. Allds, the attorney for the Forest Preserve Board, on October 4th (Record, p. 69), while Mr. Allds testified that they were placed in his keeping by Mr. Ashley on September 14th (Record, p. 54); but the date is absolutely immaterial, for it was not until October 7th, that the sale went through, the deeds having in the meantime remained in a pigeon hole (Record, p. 53).

On September 30th, and while the fifteen days were still running, plaintiff in error learned of the intended transfer to the State of the entire township, as well as of a large part of Township 32. Fearing the constitutional provision above quoted might be construed as forever precluding the construction of its line and conceiving that it must act quickly in the protection of its rights, it brought suit against the Indian River Company, and the owners above named, and obtained therein a preliminary injunction restraining such owners from making a transfer of Township 15 except such conveyance be expressly made and received subject to the right of way thereover of the route so located. Such preliminary injunction and the papers whereon it was made will be found at pages 8-14 of the Record.

The defendants in said suit moved on October 4th, to vacate the injunction on the papers whereon it was made; but Justice McLaughlin denied such motion. His opinion will be found at pages 27-28 of the Record.

Under leave granted, additional affidavits both in support and in opposition to the continuance of the injunction *pendente lite* were filed (Record, pp. 15-24), and on October 16th, the hearing upon return of the order to show cause came on, and an order was then made by Mr. Justice Kellogg continuing the injunction. He wrote no opinion, but the order will be found at pages 25-26 of the Record.

The Indian River Company appealed to the Appellate Division (Record, p. 26), which on March 2nd, 1898, reversed the order appealed from and vacated the injunction (Record, pp. 60-61). An opinion was written by Mr. Justice HERRICK in which he read for reversal on two grounds: (1) that the injunction was in effect an obstruction to the State's exercise of its right of eminent domain; and (2) that if the railroad company was vested with the rights it claimed it did not need an injunction to protect them, whereas if it was *not* vested with such rights it certainly was not entitled to an injunction. The Court unanimously concurred with Justice HERRICK for reversal; but the majority expressly limited its concurrence to the ground last stated (Record, p. 76). Justice HERRICK's opinion is reported in *27 App. Div., 326.*

In the meantime, and in anticipation of the refusal of Justice MCLAUGHLIN to vacate the preliminary injunction upon the hearing of October 4th, the Indian River Company on October 2nd executed to the State a deed of a specified portion of Township 32 and of all of Township 15, *excepting and reserving therefrom, however, the six-rod strip over which this plaintiff in error had located its route.* Such deed was marked *Exhibit 13*, and will be found at pages 52-53 of the Record.

On the same day it executed to the State another deed in all things identical with the first, except that there was no exception of or reference therein to the six-rod strip. This deed was marked *Exhibit 14* (Record, p. 53).

Of course the State acquired no interest in the six rod strip through *Exhibit 13*, for such strip was expressly excepted from the grant therein contained (Record, p. 53). It is therefore immaterial when *Exhibit 13* was delivered, although it is very clear from the evidence that there was neither delivery nor acceptance of such deed until October 7th (Record, pp. 53, 54, 65).

As to *Exhibit 14*, the only instrument under which the State can claim to have acquired title to the strip by voluntary grant, the evidence is as follows (Testimony of Mr. Allds, attorney for the forest preserve board):

"I first saw *Exhibit 14* on October 2nd. That was to

> be held subject to the direction of the Court. * * * It was handed to me to be recorded if the Court should permit the same at the end of the proceedings which were then pending. *Yes, that was on the 7th of October.* The deed remained in my possession until some time in April, 1898." (Record, p. 53.)

See also the proceedings of the forest preserve board at its meeting of October 7th when, because of the court's refusal to vacate the injunction, it accepted a delivery of *Exhibit 13* and directed a *seizure* under the Act of 1897 of the six rod strip (Record, p. 65).

The State must thus justify its claim of exclusive title to the six-rod strip, by the act of 1897 and the proceedings had thereunder. It concedes that any grant of said strip made after the *lis pendens* were filed in our condemnation proceedings conferred a title upon the grantee subject to our rights; and there is no dispute but that the *lis pendens* was filed in the first proceeding in each county on October 7th, 1897 (Record, pp. 63-64). As no delivery was made to the State of *Exhibit 14* until the month of April, 1898,—which was subsequent even to the judgment of condemnation in each proceeding,—any claim by the State of an exclusive title by voluntary grant may be regarded as disposed of, and will not be considered further in this brief.

Now what are the material features of the Act of 1897 (Appendix to Brief, pp. 49-55):—

By §1 the Forest Preserve Board was appointed.

By §2 its duty was declared to be and it was authorized to acquire for the State by purchase or otherwise such "land, structures or waters" within the limits of the Adirondack Park as it might deem advisable for the interests of the State.

By §3 the Board was authorized to enter upon and take possession of any land, structures or waters within the limits of such park, the appropriation of which in its judgment should be necessary for the purposes of a park or for the purposes specified in Article 7, Section 7, of the Constitution.

By §4 it was provided that when the Board shall have determined to seize, or as the act expresses it "appropriate," land,

the State Engineer shall furnish it with an accurate description of the land so to be appropriated, certified by him to be correct; that a majority of the board shall endorse on such description a certificate setting forth that the lands described therein have been appropriated by the State for the purpose of making them a part of the Adirondack Park; that such description and certificate shall thereupon be filed in the office of the Secretary of State; and that the board shall then serve "on the owner of any real property so appropriated" a notice setting forth the fact of such filing, the date of filing and a general description of the "real property *belonging to such owner* which has been so appropriated." The act then reads as follows:

> "From the time of such service, the entry upon and appropriation by the State of the real property described in such notice for the uses and purposes above specified shall be deemed complete, and thereupon such property shall be deemed and be the property of the State. Such notice shall be *conclusive* evidence of an entry and appropriation by the State."

By §5 the forest preserve board is given power to agree with the owners for the value of the land so taken and as to the amount of damage resulting therefrom, and provides for the payment of the sum so agreed upon.

By §6, if an agreement as provided in the last section cannot be reached, "*such* owner, within two years after the service upon him of the notice of appropriation" may go into the Court of Claims and litigate,—*what?* Simply the question of the value of the land taken and the amount of damage sustained by him by reason of the taking. And jurisdiction is conferred upon the Court of Claims to entertain such question and such question only. The section then provides for the payment to such litigant or claimant of any judgment rendered by the Court of Claims.

§§7-9 (which seem to us to be in direct conflict with the provisions of Article 7 of Section 7 of the Constitution which provides that no timber on lands acquired by the State within the limits of the Adirondack Park shall be "removed or destroyed") give to the owner an option, to be exercised within six months after the service upon him by the forest preserve board

of notice of the appropriation of his lands, of reserving and removing therefrom certain specified kinds of timber; but as the rights of the plaintiff in error are not affected by these provisions, we make no further comment upon their validity.

By §19 it is provided that if, upon the rendition of any judgment by the Court of Claims "it appears that there is any lien or incumbrance upon the property so appropriated," the amount of such lien shall be stated in the judgment and, in the discretion of the comptroller, the amount awarded by the judgment may be deposited in a bank to be distributed to such persons as the judgment may direct.

The foregoing are the material provisions of the act under which the State of New York justifies its attempted destruction of our property rights. *It is to be observed that no provision is anywhere made in the act whereby a citizen whose property is seized, can test, either before or after the seizure, the lawfulness thereof.* The State is soverign and can be sued only by her own gracious permission; and that permission is not granted by the terms of the act, or in any other way.

Now, how did the State officials seek to employ the provisions of such act for the purpose of destroying our right of way? It was not a question with them of getting the land, but *of cutting off or destroying our right to construct, maintain and operate a railroad thereover.* All the rest of Township 15 (as well as the agreed portion of Township 32) was theirs upon the delivery on October 7th of the deed *Exhibit 13* (Record, pp. 52-53); and the excepted portion had been included in the deed, *Exhibit 14*, which was deposited the same day in escrow to be delivered to the State when and if the owners could lawfully make a delivery thereof (Record, p. 53). The owners had thus done all in their power to vest title to the strip in the State, and could no longer make any disposition thereof.

The officials, and through them the State, had actual knowledge of the proceedings theretofore taken by the plaintiff in error as hereinbefore recited (Record, p. 56). See particularly the minutes of the meetings of the forest preserve board of October 1st and October 7th, 1897 (Record, pp. 59-60, 64-65). These minutes, and particularly those of the meeting of Octo-

ber 7th (Record, pp. 64-65), show that the forest preserve board, and therefore the State, sought deliberately and wilfully to ignore the existence of any right in plaintiff in error to construct its road across said township, although the fifteen day limit had fully expired; and they sought to extinguish such property right without notice to the railroad, without compensation therefor, and by the service of the notice contemplated by the Act of 1897 upon the *Indian River Company*, in which corporation the fractional parts of ownership theretofore vesting in the sundry individuals named above had at some time subsequently to October 1st been collected. The description, certificate of seizure, proof of filing, notice and proof of service thereof on the president of the Indian River Company will be found at pages 48-51 of the Record.

If this proceeding were effective, as defendants in error claim it was, to prevent the plaintiff in error from ever constructing its right of way across Township 15, then the effect of it is to deny to plaintiff in error the right to build its line anywhere north of the southerly boundary of said township, and to prevent its reaching Newcomb in the County of Essex, or to extend its line to the St. Lawrence River; for the law which would hold that it had lost its right to cross Township 15 because title thereto was vested in the State and under the provisions of Section 7 of Article 7 of the Constitution could not be taken by any corporation but must forever remain wild forest lands, would apply with equal if not greater force to any other lands already owned by the State within the limits of the Adirondack Park. The evidence shows, without having been ever questioned, that the acquisition by the deed *Exhibit 13* of title to Township 15 (except the six-rod strip) and of Township 32, completed a continuous band of State land across that part of the Adirondack region, and left as the only possible territory whereon the plaintiff in error *could* avail itself of its right to construct to Newcomb and thence to Long Lake, the six-rod strip which was the subject of the attempted seizure by the State; and that if *that* were taken away from it further construction would be impossible (Record, pp. 17-18).

Of course we do not deny that the State could take from us our vested right to cross said township through a lawful exercise

of its sovereign power of eminent domain to condemn such right, and upon the making to us of just compensation therefor; but we do insist that until she does so condemn such right, not only the Act of 1897 but even the provisions of Article 7 of Section 7 of the Constitution are subordinate thereto, and that merely condemning the strip as against the Indian River Company could not lawfully affect in any way whatever our right to cross it.

The plaintiff in error has never swerved from the above stated view of its rights. On October 7th,—subsequently, if you please, to the attempted seizure by the State,—it instituted proceedings in each of the three counties to condemn its right of way across said township. It made the Indian River Company and the owners parties defendant thereto, and did not make the State a defendant, chiefly because it could not proceed against the sovereign, and for the reason almost as cogent that even if the Act of 1897 were a valid enactment, the State had acquired title to the strip only subject to the railroad company's rights. The State, however, was cognizant of and in the name of the owners took part in the defence of those condemnation proceedings up to a certain point. It assisted in the preparation of the answer to the petition for condemnation (Record, p. 66); attended at court on the return day thereof through its attorney, conceded to be acting at the instance of the forest preserve board (Record, p. 56); requested of counsel and obtained a consent to the adjournment of those proceedings (Record, p. 56); and wrote its approval of a still further adjournment. (See *Defendants' Exhibit A*, Record, p. 70; cf. also p. 57.)

The proceedings were regularly adjourned from time to time (Record, p. 70) and finally resulted on March 12th, 1898, in judgments of condemnation in each county (Record, pp. 61-64). Those judgments were entered in each of the three counties on the 18th of March, 1898, and the meeting of the commissioners therein appointed to ascertain and fix the compensation due the owners was set for March 25th, 1898 (Record, pp. 61-63).

This action was commenced on March 25th, 1898, (Record, p. 4), with a preliminary injunction accompanying the service of the summons and complaint.

Specification of Errors.

The principal errors of which we complain, as must be apparent from a perusal of the foregoing statement, are those which uphold the validity of the condemnation features of the Act of 1897, and give such effect to the proceedings had thereunder as to deprive this plaintiff in error of a valuable property right without notice, without opportunity to be heard and without compensation. The errors asserted and intended to be urged may be stated thus:

1. That the condemnation features of the Act of 1897 are in any aspect unconstitutional and void, in that they authorize the taking of private property for an alleged public use and at the same time deny to the owner any and all opportunity of testing the nature of the use or the lawfulness of the taking. (See Assignment of Errors No. III., Record, p. 108.)

2. That even if said condemnation features be otherwise valid, and are properly construed, as they were construed by the court below, as conferring any authority whatsoever upon the State to acquire by the proceedings had thereunder against the Indian River Company, a valid title to said six rod strip exclusive of the right of this plaintiff in error to construct, maintain and operate its railroad thereover, they are unconstitutional and void in that they authorize the taking from this plaintiff in error of its vested property right so to construct, maintain and operate its railroad, without any notice whatsoever or opportunity to be heard and without the making of any compensation therefor. (See Assignment of Errors Nos. III, V, VI, IX and X, Record, pp. 108-110.)

3. That even if the condemnation features of said act be otherwise valid, and are properly construed, as the Court below construed them, as conferring any authority whatsoever upon the State to withhold, withdraw or obstruct, by virtue of the proceedings had thereunder against the Indian River Company, the vested right of this plaintiff in error to construct, maintain and operate its road over said six rod strip, they are unconstitutional and void in that they impair the obligation of an existing contract between

the State and this plaintiff in error. (See Assignment of Errors, Nos. IV, VII and X, Record, pp. 108-109.)

Other errors which we urge upon the attention of this Court are:

4. That there was no sufficient or indeed any competent evidence to warrant the Court below in holding that at any time on or prior to October 7th, 1897, the State had acquired or then held any *equitable* ownership of or interest in the six rod strip across Township 15. (See Assignment of Error No. 1, Record, p. 108.)

5. That the Court below erred in its assumption that the plaintiff in error had done nothing to extend its line beyond North Creek, except to file a map and profile of the route it adopted, and to serve notice thereof on the occupants; for it appeared by competent and unquestioned evidence that the plaintiff in error had on the faith of its franchise or vested right so to extend its line, expended divers sums of money in making surveys and in acquiring rights of way by purchase along other parts of such extension. (See Assignment of Error No. VIII, Record, p. 109.)

6. That the Court below erred in assuming, what it in effect assumed, that the State of New York as grantee under a voluntary grant of said six rod strip could and did acquire any greater estate or larger interest therein than the grantor had at the time of making such grant. (See Assignment of Errors No. II, Record, p. 108.)

7. That the Court below erred in reversing the order of the Appellate Division appealed from. It should have affirmed said order and, on the stipulation for judgment absolute given by the defendants in error on taking such appeal, should have directed final judgment to be entered in this action in favor of this plaintiff in error. (See Assignment of Errors No. XI, Record, p. 110.)

ARGUMENT.

I.

The claim of an *equitable* ownership in the State of the six-rod strip is unfounded.

Learned counsel for defendants in error seeks to make out what he calls an *equitable* title thus wise:

On August 6th, 1897, the forest preserve board adopted a resolution accepting an offer, stated therein to have been made by a Mr. McEchron and others, to sell to the State Township 15 and a part of the adjacent Township 32 (Record, pp. 5-6, 31); in the same month, and following that resolution, an engineer from the State Engineer's office made some surveys in the Township, cut some brush and drove some stakes (Record, pp. 57-58); and in November, 1897, the State paid for the land (Record, p. 33. *This,* he says, establishes an equitable title in the State from August 6th. We submit that the facts do not sustain such claim.

First.—No proof was given either showing or tending to show that the offer to sell was in writing. Yet, unless it was, it was of no validity as to the land. Under the Real Property Law of New York, then in force (Appendix to Brief, p. 27), it is provided:

> "An estate or interest in real property other than a lease for a term not exceeding one year, or any trust or power * * * cannot be created, granted, assigned, surrendered or declared unless by act or operation of law or by a deed or conveyance in writing subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing." * * *

It cannot be *presumed* that the offer was in writing in the absence of proof. So, as the case stands, no offer was made that granted any estate or interest in this Township; and the acceptance of an *oral* offer could not vest in the State any interest in the lands embraced in the resolution of acceptance.

Second.—The parties who made the offer did not own Township 15 at the time thereof, and one of them at least at no time afterwards became vested with any title thereto. It is apparent that McEchron and Ashley were the ones making the offer. "That said Ashley and McEchron did not own all of the above lands," is alleged in the Complaint (Record, p. 6). McEchron, it appeared, never owned any part of Township 15. See his testimony:

> "Q. And were you also one of the owners of an interest in Township 15? A. Not until the Indian River Company bought Township 15" (Record, p. 68).

It was shown in the Statement of Facts in the foregoing part of this brief who the owners of the Township were. The offer consequently was made by persons who did not own what they offered to sell; and it is somewhat difficult to understand how, by such an offer, the State acquired any interest in this Township. From this it would seem that the learned Justice dissenting in the Appellate Division fell into error in assuming the existence of a contract to purchase this land before the map of the plaintiff in error was filed (Record, p. 80). It is very evident that no contract at that time existed which gave to the State any right to or interest in any part of Township 15.

Third.—The only evidence given as to the pretended *possession,* is the testimony of the surveyor, Mr. Morss, at pages 57-58 of the Record. It is perfectly manifest from this, however, that his going upon the lands was solely for the purpose of computation as to the estimated cost of the proposed dam, inasmuch as the amount to be paid by the State for the entire Township depended upon such cost (Record, p. 6).

Had nothing been done after the return of Mr. Morss' surveying party, no title to and no interest in the township would have been acquired by the State, and none of the owners were in any way bound to convey to the State. This really seems too elementary to urge upon this Court.

Fourth.—The payment for the land on November 11th was not in the assertion of an equitable title, but was based upon the title by deed. (See minutes of Board meetings of October 1st and 7th, Record, pp. 59, 65.)

Fifth.—In any event, defendants in error never claimed until the trial to have gone into *possession* until after the payment of the purchase price in November. See the verified Complaint, where in connection with the allegation of payment is the following significant statement:

> "And *thereupon*" (that is upon the payment) "the plaintiffs through their State Engineer and surveyor and forest force *entered into possession of said lands.*" (Record, pp. 6-7.)

This claim of possession *prior* to the filing of the railway maps and service of notice, was not in the minds of the pleader and of the engineer who verified the complaint when the action was commenced. Counsel merely hopes that by some shadowy claim of possession under a shadowy claim of contract to sell, some kind of an *equitable* title may be spelled out which will give him some kind of a right by voluntary grant upon which he may stand, in case his title by condemnation falls. The learned Justice dissenting at Appellate Division was misled; but the contention is so manifestly untenable that further discussion would seem unnecessary. Suffice it to say that in the case of

Dodge v. *Gallatin* (130 N. Y., 117, 124-129),

upon which counsel relies below, the Court found an *actual possession* under equities which the party in possession could enforce. It therefore held that an equitable title was made out which would pass by a devise under the Statute, *32 Henry VIII, Chap. 1*, which statute controlled the matter of devises in New York until the enactment of the revised statutes of 1830.

In the case at bar the State has shown neither possession nor equities at any time prior to October 7th, 1897.

II.

The issues involved are concise and clean cut.

The learned Justice dissenting at Appellate Division and the learned Judge writing in the Court of Appeals included within their opinions such a variety of propositions that a reader might readily wonder what the issues presented by this plaintiff in error really were. In order, therefore, that no misapprehension may arise in this court as to our contentions, we respectfully state:

(1.) That we never argued, suggested or believed that "due process of law" must *always* involve a judicial proceeding and that there can *never* be due process unless a hearing be had in a court of justice. We simply urged that in the exercise of the sovereign right of eminent domain, especially where all occasion for arbitrary action is wanting, due process require that the owner whose property is taken shall at some time, in some way, and before some tribunal authorized by the State to hear him, have an opportunity to contest the presumed legality of the taking of the particular property seized; and we insisted that in this particular sovereign New York stands in no different position from any private or municipal corporation to which she has delegated the right to exercise such sovereign power.

(2.) We have always conceded that the sovereign powers of eminent domain, taxation, police power, etc., are inherent to government, as such, and are as enduring and indestructible as the State itself; nor have we ever contended that they were conferred upon the State by the Constitution, or were reserved to the State therein. At all times have we concurred in the proposition as stated by the learned Judge of the Court of Appeals that while these powers may be limited and regulated by the Constitution, they nevertheless *exist* independently of it as a necessary attribute of sovereignty. Our fundamental difference with the learned Judge was as to the extent of those constitutional limitations. He holds that there is no limitation which secures to the citizen an opportunity to be heard (except of course as to the amount of compensation) when sovereign New York exercises the right. We insist, on the other hand, that

the provisions of Section 6 of Article 1 of the State Constitution, providing that no person shall be deprived of life, liberty or property without due process of law (See Appendix to Brief, p. 1), is such a limitation; and that to give to a legislative enactment of condemnation the *conclusive* effect which the learned Judge gives it, is to permit the usurpation by the legislature of certain judicial functions of government,—for example, the determination of whether the use is or is not a public one; or whether the actual taking is or is not within the terms of the enactment. And so the question comes around again what is due process of law in a taking by the State of New York under its sovereign power of eminent domain.

(3.) We have never doubted that all private property, both tangible and intangible, is held subject to the exercise of this right by the sovereign power, even that which may already be devoted to a public use. We have simply insisted that by exercising such right against the property of the Indian River Company, the State acquired only what the Indian River Company had, namely, the six-rod strip subject to our rights thereover. We denied that the State in this indirect way could accomplish what it was powerless to accomplish directly,—the taking of our property without making any compensation to us therefor.

(4.) We have never contended that the citizen can resist a lawful taking under an exercise of this sovereign right of eminent domain; but that is a very different thing from holding that the citizen shall never be heard on the question as to whether the taking is or is not lawful.

(5.) The suggestion has never been made in this case by either side that a due exercise of the right of eminent domain requires the payment of compensation in advance or even at the time of the taking. We have always conceded that in a taking by the sovereign, the legislature has full power to direct the time and mode of payment so long as just compensation be ultimately made.

One more thing may be said under this point. It seems to have been assumed by the Court below and has been intimated

in the argument of counsel, that the devotion of this six-rod strip to the uses of plaintiff-in-error's railway, is somehow going to interfere with the construction by the Indian River Company of this mammoth dam on State lands, which "shall be forever kept as wild forest lands," and whereon no timber shall be "removed or destroyed." We do not think from the standpoint of legal rights that it would be of the slightest materiality, even were this so. But it is not so. There is not a thing in the evidence to suggest it; and as a matter of fact the six-rod strip does not come within two-thirds of a mile of the outlet of Indian Lake where the dam is to be constructed; whereas the overflow of State lands caused by the raising of the water twenty-three feet (Record, p. 58),—lands upon which no timber shall be removed or *destroyed!*—will naturally occur on the lake side of the dam and to the westward and away from the six-rod strip. The evidence shows that the six-rod strip crosses sundry lots in said Township including lots 42, 31, and 18; that it then just touches lot 17, and runs at once to the northward across lot 7, which it leaves at the northerly bound of the Township (Record, p. 49). With this evidence before it the Court will judicially note that the outlet of Indian Lake is on the easterly boundary of lots 16 and 33 (being the westerly boundary of lots 17 and 32); and that consequently the existence of a railroad over this six-rod strip cannot possibly interfere with the devotion of State lands to the construction of this dam.

III.

The authority and right granted the old Adirondack Company under the Acts of 1863, 1865, etc., to construct the line of its road from some point in the Town of Hadley, up and along the valley of the upper Hudson to some point in the Town of Newcomb, and thence to a point on the St. Lawrence River in the Town of Oswegatchie, St. Lawrence County, upon its complying with the provisions of the railroad law, was a valid franchise or grant by the State, having all the obligatory force of a contract. Such franchise or grant was acquired through foreclosure by the plaintiff in error herein, and is a property right of value.

That the plaintiff in error acquired whatever franchise or right the old Adirondack Company possessed under these statutes, has been shown above. We have therefore to consider only the question as to whether the legislation referred to granted a mere license or privilege, revocable at the will of the legislature until actual construction was completed, or, on the other hand, was a *contract* between the State and the incorporators of the old company. We think both on reason and on authority it must be held that the State is bound as by a contract.

By the Act of 1863, Mr. Cheney and his associates were expressly authorized to incorporate a company under the general railroad act of 1850, *for the purpose of* constructing and operating a railroad along the valley of the upper Hudson into the wilderness in the northern part of the State. The act declared that when so organized the company should have all the rights and privileges given by the general railroad law of 1850 (Appendix to Brief, p. 28). One of those "rights and privileges" was to acquire by eminent domain a right of way over such lands as it might select in the counties and between the termini stated in its articles of association. That the State of

New York desired this company to be incorporated and this railroad to be built, is apparent from the title of the act:

> "AN ACT to encourage and facilitate the construction of a railroad along the valley of the upper Hudson into the wilderness," etc.

The State furthermore conferred upon the company certain privileges of mining and preparing for market the mineral resources of the wilderness, which it could not possess under the general law of 1850, and authorized it to acquire not exceeding one million acres of land and granted it exemption from taxes thereon for a period of twenty-five years (Appendix to Brief, p. 28).

Mr. Cheney and his associates accepted this grant from the State and filed articles of association under the general law in which were recited among other things the places from and to which the railroad should be constructed, maintained and operated, namely, from some point in the town of Hadley, "up "and along the valley of the upper Hudson to some point in "the town of Newcomb in the County of Essex" (Record, pp. 18, 72).

By the act of 1865 and other legislation set forth in the Appendix to this brief, the legislature recognized the route so adopted, and authorized the company to build further.

Can it be urged in the face of all this, that Mr. Cheney and his associates in accepting the provisions of such legislation, accepted only parts,—and if so, what parts,—thereof? If they accepted anything at all and acted upon the faith thereof, was it not in any event the right,—more than capacity,—*right* to construct the line of said road to Newcomb and thence to the St. Lawrence River? Of course such right could be exercised only in the manner pointed out by the general railroad law; but that made it none the less a *right,* and a valuable one, too.

On the faith of such right, stock was purchased and money expended in construction. Here was a contract between the State and the stockholders. In 1872, under power conferred by Section 28, subdivision 10 of the railroad law of 1850, the company executed a mortgage upon all its property, franchises, rights, etc., and bonds were issued thereunder (Record, p. 71).

Here was a contract between the State and the bondholders. The mortgage was subsequently foreclosed and the property, rights and franchises,—valuable, every one of them,—were sold and, pursuant to a statute so permitting, were acquired by the plaintiff in error. Here was a contract between the State and this plaintiff in error.

Is there any light in which it *can* be honestly urged that a grant by the State of a right to build, maintain and operate a railroad between two stated points, is not a valuable grant; or that when private individuals invest their money or give their time to the construction of any part of such a railroad and on the faith thereof, the grant does not possess all the binding features of a contract by the State?

Whether or not such grant is revocable under the reserved powers of the State will be considered below. We are contending here merely for the proposition that the franchise so to construct, maintain and operate was in itself a *contract* from which (except by an exercise of its reserved power,—and, as we shall show below, not even then,—) the State could not withdraw without the consent of the other party thereto. The State might condemn the franchise upon the making of just compensation; but violate it, ignore it, withdraw from it, obstruct it,—never.

Counsel below sought to draw a distinction between the franchise to exist as a corporation, and the franchises which an existing corporation might acquire by virtue of acts done after it had became a corporation. In his argument he limited the effect of an act of incorporation to an acquisition from the State of a franchise *to be* and an endowment of the artificial being, by the State, with certain mere *capacities* of doing something thereafter. But we submit this view is too narrow. In so far as an act creating a corporation bestows substantial rights, it is a *grant,* and in so far as it creates the artificial being and endows it with capacities, it is mere *law.*

In *Railroad Co.* v. *Georgia* (98 U. S., 365) this Court recognized that the word "franchise" was generic, covering all rights granted by the legislature, and held it too narrow a defi-

nition of such word to regard it as meaning only the right to be a corporation.

To same effect, see

Pierce v. *Emery* (32 N. H., 484).

In *Morgan* v. *Louisiana* (93 U. S., 217, 223) FIELD, J., speaking of statutory immunity from taxation, said:

> "The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value. * * * They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal and incapable of transfer without express statutory direction."

In *Hall* v. *Sullivan R. R.* (2 Redf. Amer. Ry. Cases, 612, 624), CURTIS, J., sitting at U. S. Circuit, said:

> "The franchise to build, own and manage a railroad and to take tolls thereon are not necessarily corporate rights. They are capable of existing in and being enjoyed by natural persons."

These two cases were cited and approved in

New Orleans R. R. v. *Delamore* (114 U. S., 508).

See also

Salt Company v. *East Saginaw* (13 Wall., 378),

where Justice BRADLEY said:

> "Charters granted to private corporations are held to be contracts. Powers and privileges are conferred by the State, and corresponding duties and obligations are assumed by the corporation."

See also

Farrington v. *Tennessee* (95 U. S., 683).
Georgia Pacific Co. v. *Wilks* (86 Ala., 482).

A leading case on this subject, if any be needed, is

Boston & Lowell Ry. v. *Salem, &c., Ry.* (2 Gray, 1),

where SHAW, C. J., in construing the charter of the plaintiff which authorized it to construct a railroad from Boston to Lowell, said:

> "In construing this act of incorporation, we are to bear in mind the time and circumstances under which it was made, but more especially to take into consideration every part and clause of the act and deduce from it the true meaning and intent of the parties. The act, like every act and charter of the same kind, is a contract between the government on the one part, and the undertakers accepting the act of incorporation on the other, and therefore what they both intended by the terms used, if we can ascertain it, forms the true construction of such contract. It conferred on the persons incorporated the franchise of being and acting as a corporation, *and the authority to locate, construct and finally complete a railroad* at or near the city of Boston, thence to Lowell. That this was regarded as a public improvement, and intended for the benefit of the public, is manifest from the whole tenor of the act, more especially from the authority to take property on paying a compensation in the usual manner, which would otherwise be wholly unjustifiable. It is equally manifest from the whole tenor of the act, and the nature of the subject, that the work would require a large outlay of capital."

The learned Judge then referred to a subsequent provision in the charter, providing that no other railroad should be authorized within thirty years to be constructed from Boston to any point within five miles of Lowell, and continued:

> "The question is, does this provision confer any exclusive right, interest, franchise or benefit on this corporation? It is found in the same act, the whole is presented at once to the consideration of the incorporators, to be accepted or rejected as a whole, and this would of course constitute a consideration in their minds in determining whether to accept or reject the charter. If it adds anything to the value and benefit of the franchise, such enhanced value is part of the price which the public propose

to pay, and which the undertakers expect to receive as their compensation for furnishing such public improvement.

"This is a stipulation of some sort, a contract by one of the contracting parties to and with the other. * * * *It was made by government in its soverign capacity, with subjects who were encouraged by it to advance their property for the benefit of the public.* It was certainly a stipulation on the part of the government regulating its own conduct and putting a restraint upon its own power to authorize any other railroad to be built," etc.

The true rule is perhaps most concisely stated in the words of Mr. Justice McLean in

Bank of Ohio v. *Knoop* (16 How., 369):

"Every valuable privilege given by the charter and which conduced to an acceptance of it and an organization under it, is a contract which cannot be changed by the legislature where the power to do so is not reserved in the charter."

And we cannot refrain from quoting from

Ohio v. *Commercial Bank* (10 Ohio, 335),

the very words quoted by Justice McLean in the *Knoop* case:

"A contract between the State and individuals is as obligatory as any other contract. Until a State is lost to all sense of justice and propriety, she will scrupulously abide by her contracts,—more scrupulously than she will exact their fulfilment by the opposite contracting party."

Counsel relied below upon a claimed application of the rule of

In re. Commrs. of Washington Park (56 N. Y., 144, 157).

In this case a motion was made by commissioners of appraisal to discontinue their proceedings, after the owners had been cited and were in court. The owners objected, and sundry English cases sustained their contention. Rapallo, J., cited a line of New York cases:

Corporation v. *Dover Street* (18 Johns., 505);
In re. Beekman Street (20 *id.*, 269);

In re. Canal Street (11 Wend., 154);
In re. Anthony Street (20 *id.*, 620);
Martin v. *Mayor of Brooklyn* (1 Hill., 545);
Corporation of New York v. *Mapes* (6 Johns. Ch., 49);
People v. *Village of Brooklyn* (1 Wend., 319);

as authority for the proposition, which was the only matter decided by the *Washington Park* case, that until final confirmation of the report of commissioners of appraisal, the owners of land taken for a public use have no vested interest in the *damages assessed or to be assessed.*

This, however, is a very different proposition from saying that the right of a corporation under legislative grant to acquire by exercise of the right of eminent domain, a right of way over lands between specified termini is in no sense a property right, and can be cut off by the legislature at will and without compensation.

It cannot be contended that the proceedings had by plaintiff in error under §83 of the Railroad Law, affected in any way the vitality of these franchises or rights. The contract with the State was that plaintiff in error should avail itself of the grant and complete the road within ten years from the filing of its articles of association on pain of forfeiting to the State its existence and powers (Appendix to Brief, p. 7). That was one of the conditions of the contract; and it was perfectly competent for the State to release the other party from the fulfilment of such condition, without in any way withdrawing its own grant, if it chose so to do. Section 83 left it to the judgment of the Railroad Commissioners to determine whether any railroad applying should be so released, and enacted that the certificate of the Railroad Commissioners should have that effect. That is all there is to it.

But even were it otherwise, the statute is not self-executing, and no ground of forfeiture has been judicially declared equivalent to office found.

See *Houston & Ry.* v. *Texas* (170 U. S., 260),

and cases cited.

IV.

Upon the expiration of fifteen days after the plaintiff in error had filed its maps and profiles and served notice of such filing upon the occupants of the land over which it had located its route,—no application having been made by any party to change such location,—it was vested with a completed right of action to condemn that land for the purposes of its right of way; and no transfer of such land to any person or to the State could free it from a liability to be so condemned.

It was in connection with this proposition that the Court of Appeals was obliged to recede from the unambiguous language of three former opinions which for years had been regarded as properly declaring the legal effect of a railroad company's filing its map and giving notice to the occupants, under section six of the Railroad Law (See Appendix to Brief, pp. 20-23).

The first of these cases was

Rochester & Hornellsville R. R. v. *Erie Co.* (110 N. Y., 128),

where the Court said:

> "When therefore a corporation has made and filed a map and survey of the line it intends to adopt for the construction of its road and has given the required notice to all persons affected by such construction, and no change of route is made as the result of any proceeding instituted by any land owner or occupant, in our judgment it has acquired the right to construct and operate a railroad upon such line exclusive in that respect as to all other railroad corporations, and free from the interference of any party. *By its proceedings it has impressed upon the lands a* LIEN *in favor of its right to construct, which ripens into title through purchase or condemnation proceedings.*"

This was followed and expressly approved in

The Surburban Rapid Transit case (128 N. Y., 510, 518),

where the Court, in speaking of the rapid transit act, said:

> "The route, or routes, located are unalterable by the company, and I think the property over which the line of the route runs must be affected as fully for the purpose as it would be in a case where, under the General Railroad Act, a corporation has made and filed a map and survey of the line of route it intends to adopt for the construction of its road and has given the required notice to all persons affected thereby. * * * In such a case we have held:"

Then follows what has already been quoted from the opinion in the *Hornellsville case* (110 N. Y., 128). Again, on page 519, following this quotation, the Court said:

> "When the route or routes were located, upon which the railroad of the new corporation should be constructed, what other legal effect *could* follow except a subjection of the land affected to this species of public use, as through the exercise of paramount right? The subsequent purchase, or condemnation of the title to the lands, in the course of the railroad construction was merely incidental and was necessary in order to compensate property owners for the land taken, and to effect a transfer of the legal title."

> Again (p. 520): "To say that the right to appropriate the land on the designated routes for railroad uses was not vested, but merely inchoate, in my judgment would be a great misapprehension of the effect and value of formal proceedings conducted under legislative authority and direction, and of the formal consents of the public authorities to the projected line."

The *Hornellsville case* was again referred to and the decision was approved in

Pocantico Water Works Co. v. *Bird* (130 N. Y., 249, 256).

It thus appears that upon these three occasions the Court of

Appeals had approved the proposition that: "*By its proceed-*
"*ings it has impressed upon the lands a* LIEN *in favor of its*
"*right to construct, which ripens into title through purchase*
"*or condemnation proceedings.*"

Justice HERRICK, in his dissenting opinion at Appellate Division, recognized the vice of these opinions in the fulness of their language (Record, p. 82), and pointed out that if the true construction of section six of the Railroad Law was to give to a railroad company which had done what was there set forth as being necessary to be done, a *lien* upon the land over which the route was located, then it must be held as established law that the legislature had conferred upon a corporation the right to take from a man, without notice and without compensation, the most valuable element of his property,—his right to dispose of it freely.

The learned judge of the Court of Appeals, perceiving the force of this reasoning, declared that the "so-called lien" was after all but "an exclusive right of one of two contending rail-
"road corporations as against the other to build a road on a
"certain piece of land, or of a railroad corporation to hold land
"already condemned for a public use, as against a city seeking
" to condemn it for another public use, without special author-
"ity from the legislature" (Record, p. 105).

This is certainly a unique interpretation of the meaning of the word "lien," as previously used by the court, and completely ignores, we submit, the fact that after the expiration of the fifteen day period, the owner is powerless to change the location of the route, and that no transferee can move to change such location. The time to move, be there one owner or a series of owners, expires absolutely and forever and as against all subsequent owners, with the expiration of the fifteen day period. And so it is hardly a matter which affects merely the priority of right between "two contending railroad corporations."

Again the learned judge sought to save the language of the former decisions by likening the "so-called lien" acquired under section six of the Railroad Law, to the lien of a judgment on real estate. In either case it was only a "statutory lien," he said: and on the principle of what the Lord giveth He taketh away, the learned judge held it was perfectly competent for the

legislature to chop this "lien" off whenever it saw fit to do so. He declared that the "lien" was not in any event good as against the State, for the State could not be presumed by creating the defendant (plaintiff in error) and giving it the power of eminent domain, to have placed in its hands a weapon to be used against itself. "No argument," he declares, "is required to refute an absurdity" (Record, pp. 102-105).

In support of his proposition that the legislature has full right to terminate the "lien" recognized in the three former decisions as acquired under section six of the Railroad Law, he rests upon the case of

Watson v. *N. Y. C. R. R.* (47 N. Y., 157),

from which he makes long quotations. We ask the Court to read those quotations (Record, pp. 103-104), and indeed the whole opinion.

Assuming that the right acquired is a "lien,"—which we do not think it is,—we submit that the *Watson* case is not at all in point. It is an authority simply for the proposition that the legislature has the power to change a given *remedy*, so long as it does not take away all remedy or impair or destroy the *right*. It is distinguishable at once from the case at bar, where taking away the "statutory lien" upon the six-rod strip deprives the plaintiff in error for all time of its vested right to continue the construction of its line of railroad.

The distinction between an act which affects *merely* a remedy and one which destroys the very right itself, has been carefully preserved in a long line of decisions in this court.

In *Gunn* v. *Barry* (15 Wall., 610),

the facts were these:

Prior to 1861, the homestead exemption law of Georgia set apart 50 acres of land and 5 acres additional for each child of the debtor.

In 1866, plaintiff in error obtained judgment against one Hart for $531. Hart then had 277 acres of land worth $1,400, and Gunn's judgment constituted a lien on said land.

A new constitution was adopted in Georgia in 1868 and an act of the legislature was passed the same year, which fixed, as the homestead exemption, realty of the value of $2,000.

Subsequently to the adoption of the constitution and the passage of this act, Gunn required defendant in error, as Sheriff, to levy on the 277 acres. He refused to do so on the ground that they had been set apart under the act of 1868; and Gunn then petitioned for mandamus. The courts of Georgia sustained the Sheriff.

> SWAYNE, J.: "If the remedy is a part of the obligation of the contract, a clearer case of impairment can hardly occur than is presented in the record before us. The effect of the act in question, under the circumstances of this judgment, does not indeed merely impair, it *annihilates* the remedy. There is none left. But the act reaches still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is in effect taking one person's property and giving it to another without compensation. This is contrary to reason and justice and to the fundamental principles of the social compact. * * *
>
> "The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A State may change them, *provided the change involve no impairment of a substantial right.* If the provision of the constitution or the legislative act of a State, fall within the category last mentioned, they are to that extent utterly void. They are for all the purposes of the contract which they impair, as if they had never existed."
>
> *Edwards* v. *Kearzey* (96 U. S., 604)

was another homestead exemption case.

The act of 1859 of North Carolina set apart 50 acres. While that act was in force Kearzey became indebted to one Doe. On April 24th, 1868, the new constitution of North Carolina took effect which set apart real estate to be selected by the owner, not exceeding $1,000 in value; and the legislature of the same year prescribed the method of setting apart the homestead. In January, October and December, 1868, three several judgments were obtained by Doe against Kearzey.

On January 22nd, 1869, the premises in question were set

apart to Kearzey as a homestead. He had no other real estate, and the value of that set apart did not exceed $1,000.

On March 6th, 1869, the Sheriff sold the premises in execution to plaintiff in error. At that time the legislation of 1868 was in force and that of 1859 had been repealed.

Plaintiff sued to recover possession. The courts of North Carolina held that the property was protected by the act of 1868, and that the Sheriff's deed conveyed nothing.

> SWAYNE, J.: "The obligation of a contract includes everything within its obligatory scope. Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it, the contract as such, in the view of the law, ceases to be and falls into the class of those imperfect obligations, as they are termed, which depend for their fulfilment upon the will and conscience of those upon whom they rest. The ideas of right and remedy are inseparable. 'Want of right and want of remedy are the same thing.' * * *
>
> "It is also the settled doctrine of this Court, that the laws which subsist at the time and place of making a contract enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement." Citing sundry cases.

> CLIFFORD, J., wrote a concurring opinion: "Where an appropriate remedy exists for the enforcement of the contract at the time it was made, the State legislature cannot deprive the party of such a remedy, nor can the legislature append to the right such restrictions or conditions as to render its exercise ineffectual or unavailing. State legislatures may change existing remedies, and substitute others in their place; and if the new remedy is not unreasonable, *and will enable the party to enforce his rights without new and burdensome restrictions*, the party is bound to pursue the new remedy."

Justice CLIFFORD then discussed the effect of statutes in abolishing imprisonment for debt, requiring the recording of instruments, and shortening the statutes of limitation; and then said:

> "Beyond all doubt, a State legislature may regulate all

such proceedings in its courts at its pleasure, subject only to the condition that *the new regulation shall not in any material respect impair the just rights of any party to a pre-existing contract.* * * * Mere remedy, it is agreed, may be altered at the will of the State legislature if the alteration is not of a character to impair the obligation of the contract; and it is properly conceded that the alteration, though it be of the remedy, *if it materially impairs the right of the party to enforce the contract,* is equally within the constitutional inhibition."

Justice HUNT also wrote a concurring opinion in which he quoted approvingly the words of DENIO, J., in

Morse v. *Goold* (11 N. Y., 281),

where he said:

"The question is whether the law which prevailed when the contract was made has been so far changed that there does not remain a substantial and reasonable mode of enforcing it in the ordinary and regular course of justice."

In

Planter's Bank v. *Sharp* (6 How., 301),

the Court said:

"It is competent for the States to change the form of the remedy, or to modify it otherwise as they may see fit, *provided no substantial right secured by the contract is thereby impaired.* No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced, the act is within the prohibition of the Constitution and to that extent void." Citing

Bronson v. *Kinzie* (1 How., 311).

McCracken v. *Hayward* (2 *id.*, 608).

In

Green v. *Biddle* (8 Wheat., 1),

the Court said:

"It is no answer that the acts of Kentucky now in ques-

tion are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they overturned his rights and interests."

In

Planter's Bank v. *Sharp* (6 How., 301),

the Court said:

"One of the tests that a contract has been impaired is that its *value* has by legislation been diminished. It is not, by the Constitution, to be impaired *at all*. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation,—dispensing with any part of its force."

In

Walker v. *Whitehead* (16 Wall., 314),

it appeared that a statute was enacted in Georgia in 1870, providing that no recovery could be had upon any debt accruing prior to June 1st, 1865, unless the plaintiff should first establish that all taxes chargeable on such debt had been paid. Plaintiff sued on a promissory note dated March 28th, 1864. The case was dismissed on the opening because plaintiff had not filed an affidavit showing payment of taxes. *Held,* this was a change in the remedy affecting the obligation of the contract.

SWAYNE, J.: "Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment. The *obligation* of the contract is the law which binds the parties to perform their agreement. *Any* inpairment of the obligation of a contract—the degree of impairment is immaterial—is within the prohibition of the Constitution. The State may change the remedy provided no substantial right secured by the contract is impaired. Whenever such a result is produced by the act in question, to that extent it is void. The States are no more permitted to impair the efficacy of a contract

in this way than to attack its vitality in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the Constitution. It must be left with the same force and effect, *including the substantial means of enforcement*, which existed when it was made."

To the same effect see words of Chief Justice WAITE in

Antoni v. *Greenhow* (107 U. S., 775),

and of Justice SHIRAS in

Morley v. *Lake Shore Ry. Co.* (146 *id.*, 170).

See also

Brine v. *Insurance Co.* (96 U. S., 637).

We think the language in the *Watson* case (from which Judge FOLGER dissented and in which Judge PECKHAM took no part) is too broad, in that it seems to place the matter of the lien of judgments *wholly* under the control of the legislature (see 47 N. Y., p. 165); but even if it be otherwise sound, it is clearly distinguishable in two important features: (1) In the case at bar when the statutory remedy is cut off, *all* remedy is taken from us, whereas in the *Watson* case it might be argued that the fund paid by the railroad company to the owner could still be pursued in a court of equity or otherwise, and so in no real degree was the judgment creditor deprived of his remedy by the cutting off of his lien upon the real estate of the judgment debtor; and

(2) What the learned judge below calls our "remedy," that is our vested right to subject the six rod strip to the purposes of our incorporation, was really the very essence of the thing granted us by the State; and the State cannot now take that away from us simply because it gave it to us, any more than it can withdraw at will from any other contract it may have entered into.

The reasoning of the *Watson* case, in its apparent breadth of application, was passed with evident questioning in

Crane v. *City of Elizabeth* (36 N. J. E., 342).

In the dissenting opinion of DWIGHT, C., in

Fitzpatrick v. *Boylan* (57 N. Y., 442)

the case seems to be regarded as supporting the proposition for which we contend, namely, that a remedy is a part of the obligation of the contract in those cases where, without the remedies that are taken away, no efficient remedy remains. The *Fitzpatrick* case turned on the effect of a new mechanics lien law, and DWIGHT, C., recognized the principle we are contending for when he said:

> "It may even be properly claimed that the lien was a part of the contract, as the mechanic may be fairly supposed to have contracted to furnish the materials, etc., with a view to this remedy against the owner." Citing
>
> *Blauvelt* v. *Woodworth* (31 N. Y., 285, 287).

We cannot find that the *Watson* case has been cited on the point now under consideration anywhere else until referred to in the opinion below, except in a case in Michigan where a new mechanics lien law gave substantially the same remedy as the one it was designed to supersede, the difference being merely in the procedure for enforcement.

Hanes v. *Wadey* (2 L. R. A., 498, 500).

But we agree with Justice HERRICK that if section six of the Railroad Law impresses the land with a *lien*,—be it good for one year or for 985 years,—it deprives the owner without notice and without compensation of the most valuable incident of property, the right of unrestricted disposal; and it is just so far unconstitutional and void. But we do not think that that is its effect.

The operation of section six must be looked at from two sides: from the side of the railroad and from the side of the land owner. Looking at it first from the side of the land owner, we are free to concede that if to any material degree its operation is to place a burden upon the land or to increase a burden already existing thereon, it falls within the inhibition of the constitution. But does it? All lands owned by individuals or by private corporations, and not devoted to a public use, are liable to be taken at

any time by an exercise of the sovereign right of eminent domain; that is, the owner may be deprived of his land for a public use upon just compensation being made to him therefor. If such liability be a burden, all land is subjected to it and it is not usually recognized as a burden. Section six, we submit, does not increase this burden, but simply gives it direction. The land was previously liable to be taken for a public use, upon due payment therefor; it is still liable to be taken for such use upon such payment. Only, *now* it is liable to be taken by the railroad which shall have complied first with the provisions of section six, or else by sovereign New York if she elects to take it before any railroad shall have so complied. This cannot in any way be held to have *increased* the burden upon the land. The owner could never previously have conveyed his property free from a liability to be taken by eminent domain; he cannot now do so. That is all. The fact that he knows the particular corporation or the particular personality which will exercise that right, is not any added restraint upon alienation or any increase of burden. Therefore, the provisions of section six are *not* open to the objection which the words of the Court of Appeals in the Hornellsville case would seem to indicate.

Applying these principles to the case at bar, we find that McGinn, the Finches, Hitchcock and Ashley owned the six rod strip across Township 15, subject to being divested of it at any time for a public use upon payment of compensation. They could not convey it freed from such liability. On the morning of October 7th, when the fifteen day period had expired after the filing of the maps and the serving of notice, they held the land subject to being taken by the Adirondack Railway Company for a public use upon payment of compensation. Their burden had not been increased; yet that is all that they owned in the land, all they did or could convey to the Indian River Company, all that the Indian River Company ever acquired, and all that the State ever got from the Indian River Company either by deed or condemnation,—*unless* there was something in the sovereignty of the State which merged or destroyed or rendered inoperative this liability of the six rod strip to be taken by the Adirondack Railway Company.

So much for the operation of section six from the land owner's standpoint.

From the side of the railroad it is apparent that the statute gave and was intended to give and was properly construed in the three aforementioned opinions, and in hosts of others, as giving, an exclusive, vested right to construct, maintain and operate its railroad over the land so designated.

See

Sioux City R. R. v. *Chicago R. R.* (27 Fed. Rep., 770).
Davis v. *Titusville R. R.* (30 Amer. & Eng. R. R. Cases, 341).
Denver R. R. v. *Alling* (99 U. S., 468).
Denver R. R. v. *Carson City R. R.* (99 *id.*, 463).
Morris & Essex R. R. v. *Blair* (9 N. J. Eq., 635).

Unless, then, there were something peculiar in the character of the State as a grantee, which of itself would lawfully destroy without notice and without compensation this vested right,—which is manifestly of great value to the plaintiff in error,—the State took just what the Indian River Company had, and no more, and was therefore never entitled to a judgment in this action enjoining the exercise by us of such right. That there is no such power in the State, and that her assumption thereof not only impairs the obligation of a contract which she herself made, but also violates the constitutional inhibition against the taking of private property without due process of law, is discussed in other parts of this brief.

It only remains to point out under this head that no question is here involved of the binding effect upon this Court of the decisions of the State Courts of New York.

In

Gourmley v. *Clark* (134 U. S., 338),

Mr. Chief Justice FULLER said:

> "Upon the construction of the constitution and laws of a State, this court, *as a general rule,* follows the decisions of her highest court, *unless they conflict with or impair the efficacy of some provision of the federal Constitution*

or of a federal statute, or of a rule of general or commercial law."

See also

Stutsman County v. *Wallace* (142 U. S., 293).
Bucher v. *Cheshire R. R.* (125 *id.*, 555).
Burgess v. *Seligman* (107 *id.*, 33, 34).

In the last mentioned case, a leading one on this subject, Justice BRADLEY said:

"We do not consider ourselves bound to follow the decision of the State court in this case. When the transactions in controversy occurred * * * no construction of the statute had been given by the State tribunals contrary to that given by the Circuit Court. * * * * Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which became rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. * * * But where the law has not been thus settled, it is the right and duty of the Federal Courts to exercise their own judgment."

In

Norton v. *Shelby County* (118 U. S., 440),

Justice FIELD said:

"On many subjects the decisions of the courts of a State are merely advisory, to be followed or disregarded, according as they contain true or erroneous expositions of the law as those of a foreign tribunal are treated. But on many subjects they must necessarily be conclusive; such as relate to the existence of her subordinate tribunals; the eligibility and election or appointment of her officers; and the passage of her laws. No Federal court should refuse to accept such decisions as expressing on these subjects the law of the State."

See also

Butz v. *City of Muscatine* (8 Wall., 582).
Wade v. *Travis County* (174 U. S., 499, 509).

In

Pease v. *Peck* (18 How., 599),

GRIER, J., said:

> "In all cases where there is a settled construction of the laws of a State, by its highest judicature, established by admitted precedent, it is the practice of the courts of the United States to receive and adopt it without criticism or farther inquiry. * * * When the decisions of the State court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions,—and much more is this the case where after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedents."

In

Louisville R. R. v. *Palmes* (109 U. S., 257),

the Court, by MATTHEWS, J., said:

> "The question we have to consider and decide is whether *in the judgment under review* the Supreme Court of Florida gave effect to a law of the State which in violation of the Constitution of the United States impairs the obligation of a contract. In reaching a conclusion on this point, we decide for ourselves, independently of the decision of the State court whether there is a contract and whether its obligation is impaired; and if the decision of the question as to the existence of the alleged contract requires a construction of State Constitutions and laws, we are not necessarily governed by previous decisions of the State courts upon the same or similar points, *except where they have been so firmly established as to constitute a rule of property.* Such has been the uniform and well-settled doctrine of this court." Citing

State Bank of Ohio v. *Knoop* (16 How., 369, 391),

and citing and quoting from Chief Justice TANEY's opinion in

Ohio Life Ins. Co. v. *Debolt* (16 How., 416-432).

Nor will this Court accept as conclusive a decision of the State Court after the rights of the parties have become fixed.

East Alabama Ry. v. *Doe* (114 U. S., 353).
Buncombe County Comm'srs v. *Tommey* (115 *id.*, 127).
Anderson v. *Santa Anna* (116 *id.*, 362).

The rule that decisions of the highest Court of the State, as to the interpretation or construction of the constitution and laws of the State, are controlling on this Court, is in any event limited to decisions announced before the rights of parties accrued.

Bolles v. *Brimfield* (120 U. S., 763).
German Bank v. *Franklin B.* (128 *id.*, 538).

In the latter case the Court referred to the case of

Douglass v. *County of Pike* (101 U. S., 677),

where it was said:

> "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself."

See to same effect

Folsom v. *Ninety-six* (159 U. S., 626-627).

A single decision of the highest Court of the State, even when construing words in a deed or will and so affecting title to real estate is not conclusive upon this Court; but only when those words have by a series of decisions become a settled rule of property.

Barber v. *Pittsburgh Ry.* (166 U. S., 100).

V.

The State cannot deprive the plaintiff in error of its vested property rights under any pretended exercise of the reserved power; nor in any other way except by a direct taking upon a lawful exercise of one of its sovereign powers.

That the acts of 1863, 1865, etc., and all the general legislation affecting the rights of plaintiff in error, were passed subject to the constitutional provision of 1846:

> "Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. *All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.*" (Article VIII, Section 1. See Appendix to Brief, p. 2);

and that 1 Rev. Stats., Chap. XVIII, Title 3, §8 (See Appendix to Brief, p. 3), in force from 1829 to 1882, reads as follows:

> "The charter of every corporation that shall hereafter be granted by the legislature, shall be subject to alteration, suspension and repeal in the discretion of the legislature";

and that §48 of the general railroad law of 1850, in force from 1850 to 1890, contained this provision:

> "The legislature may at any time annul or dissolve any incorporation formed under this act; but such dissolution shall not take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which shall have been previously incurred." (*Laws 1850, Chap. 140, §48.* See Appendix to Brief, p. 7),

is, of course, conceded. But we submit that the provisions of the federal constitution, as uniformly interpreted in a long line of authorities in this and in other courts, including the courts

of New York, do not permit the State under such "reserved powers," to impair the obligation of a contract or to deprive a person of his property without due process of law.

Within the meaning of these federal safeguards a corporation has been held to be a "person."

Minneapolis R. R. v. *Beckwith* (129 U. S., 26).
Smyth v. *Ames* (169 *id.*, 466, 522, 526).

The reserved power to alter, amend or repeal, whether reserved in the constitution or by a statute, is not, and cannot upon the most primary considerations of justice and common honesty, be held to be a *condition* of the grant by the State of any franchises or rights of a contractual nature. This has been repeatedly held not only in this court, as we shall show below, but also in New York by a long line of established cases. See the well considered opinion of Chief Judge Ruger in the famous Broadway Railroad case.

People v. *O'Brien* (111 N. Y., 1, 49),

and the numerous cases cited therein, as well as those following and approving such decision.

These provisions to alter, amend or modify do not give to the legislature an arbitrary control over the rights and property of a body of corporators, but are limited by the recognized principle of justice and right that *the proposed alteration must be reasonable and consistent with the scope and object of the corporation as originally agreed upon.*

Morawitz on Corporations, §1096.

Nor are the words contained in the provision of the Revised Statutes above quoted, that the charters of all corporations thereafter granted should be subject to alteration, suspension or repeal "at the *discretion* of the legislature," any more comprehensive than a simple power to alter, amend or repeal. This has been expressly held in the case of

Hamilton Gas Co v. *Hamilton City* (146 U. S., 258, 271).

In the case of

People v. *O'Brien* (111 N. Y., 1, 51),

already cited, Judge RUGER said:

> "An *express* reservation by the legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law; *and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly, would be equally ineffectual and void.*"

In *Shields* v. *Ohio* (95 U. S., 324) SWAYNE, J., said:

> "The power of alteration and amendment is not without limit. The alterations must be reasonable; they must be made in good faith, *and be consistent with the scope and object of the act of incorporation.* Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations in such cases are surrounded by the same sanctions and are as inviolable as in other cases."

A case in which this subject is well considered is

Comm'srs of Fisheries v. *Holyoke Co.* (104 Mass., 451).

It appeared in this case that defendant company had purchased its plant from the Hadley Falls Co., and that that company had been incorporated with power to build a dam across the Connecticut River at Holyoke upon payment of damages to the owners of the fishing rights *above* such dam. It did so. *The act permitting such construction was subject to a general act permitting alteration, amendment or repeal at the pleasure of the legislature.* After the Holyoke Co. had succeeded to the rights, etc., of the Hadley Falls Co., the fisheries *below* the dam began to suffer because the shad not being able to pass the dam to their usual spawning ground, did not come up the river at all. The plaintiffs, acting for the State and under a general statute giving them power so to act, brought suit to compel the defendant to put a suitable fishway in their dam. Defendant

resisted on the ground that the State's compelling them so to do impaired the obligation of the contract included in the original grant to the Hadley Falls Co. *Held,* GRAY, J., that as it did not appear that the original grant permitted them to construct a dam *without* a fishway, and as the construction of fishways was a public use, the reserved power to amend or alter permitted the State to compel the construction of the fishway. He spoke on the general subject as follows:

> "The extent of the power reserved by such an enactment has been the subject of some diversity of judicial opinion, and a definition of its extreme limit is not necessary to this case. It is sufficient now to say that it is established by adjudications which we cannot disregard, and the principles of which we fully approve, that it at least reserves to the legislature the authority to make any alteration or amendment in a charter granted subject to it, *that will not defeat or substantially impair the object of the grant, or any rights which have vested under it,* and that the legislature may deem necessary to secure either that object or other public or private rights."

The *Holyoke Co.* case was brought to this Court on writ of error, as

Holyoke Co. v. *Lyman* (15 Wall., 500, 522).

Justice CLIFFORD wrote the opinion, concurred in by a unanimous Court, and made the words of Judge GRAY above quoted and italicized, the words of this Court.

Another well-known Massachusetts case on the same subject, is

Commonwealth v. *Essex Company* (13 Gray, 239),

where it appeared that the act of incorporation of defendant permitted it to dam the Merrimac River upon its constructing a fishway to be approved by the county commissioners. The company constructed a fishway under the direction of the commissioners, who duly approved the same. Later, the company was authorized to increase its capital stock to a given sum upon condition that it would pay damages to the owners of the fishing rights above the dam, which were occasioned by the alleged

insufficiency of the fishway already constructed. The company accordingly paid about $26,000 damages and increased its capital stock. Eight years later a statute was passed, compelling the Essex Company to make and maintain around its dam a suitable and sufficient fishway for the usual and unobstructed passage of fish. Upon defendant neglecting to construct a new fishway, this indictment was found. *The original charter had been granted subject to amendment, alteration or repeal.* SHAW, C. J., commented (p. 246) upon the great importance to the Commonwealth, as a public use, of protecting the inland fisheries, but held that there was no power in the legislature to compel the company to do the acts from which by the terms of their charter *as a contract* they had been exempted; and he pronounced the latter act null and void.

In

St. Louis, Iron Mt'n, &c., Ry. v. *Paul* (173 U. S., 408),

an act of Arkansas providing that upon the discharge of a railway employee his wages should become payable on the day of his discharge and should continue thereafter until paid, not exceeding 60 days, was held valid under the reserved power, as being wholly prospective in operation.

> FULLER, C. J., said: "The power to amend 'cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made.' WAITE, C. J., in *Sinking Fund Cases* (99 U. S., 700); but any alteration or amendment may be made '*that will not defeat or substantially impair the object of the grant,* or any rights which have vested under it, and that the legislature may deem necessary to secure either that object or other public or private rights.' GRAY, J., in *Commissioners* v. *Holyoke Company* (104 Mass., 446, 451); *Greenwood* v. *Freight Co.* (105 U. S., 13); *Spring Valley Co.* v. *Schottler* (110 U. S., 347)."
>
> See also *Close* v. *Greenwood* (107 U. S., 466, 476).

In

Georgia R. R. v. *Smith* (128 U. S., 174, 182),

Justice FIELD said:

> "It is conceded that a railroad corporation is a private

> corporation though its uses are public, and that a contract embodied in terms in its provisions, or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligation of contract."

To same effect, see

> *Pearsall* v. *Great Northern Ry.* (161 U. S., 646).
> *Bank of Commerce* v. *Tennessee* (163 *id.*, 416, 424).

The case of

> *Houston, etc., Ry.* v. *Texas* (170 U. S., 243),

seems in point. It there appeared that plaintiff in error was the successor of the Galveston & Red River Railway, which had been incorporated in 1848 with the right to make, own and maintain such branches as they deemed fit. It changed its name by act of legislature in 1856 to Houston & Texas Central Railway.

The Washington County Railroad was incorporated in 1856 with the right to construct, maintain and operate a line from some point on the line of the Houston Railway, to the town of Brenham. It at once constructed and put in operation a line from the village of Hemptead (on the line of the plaintiff in error), straight towards the City of Austin, to the town of Brenham, a distance of 25 miles.

In 1853 an act had been passed granting the plaintiff in error (under its then name of Galveston & Red River Railway) the right to construct a branch *towards* the city of Austin; and Mr. Chief Justice FULLER (p. 254) held this to be an authority to construct a branch *to* the city of Austin, which had not been repealed at the times hereinafter referred to.

In 1866, a special act of the legislature gave to plaintiff in error a grant of 16 sections of state land for every mile of road it had constructed or might construct in accordance with its charter.

In 1868, the Washington County Railroad was sold in foreclosure and purchased by plaintiff in error. On the day of the purchase (August 29th) the convention assembled to frame a new constitution for the State and which did frame the constitution adopted in 1869, passed an ordinance reciting that plaintiff in error had become the owner by purchase of the Washing-

ton County Railroad; that plaintiff in error desired to extend its Washington County branch to Austin as soon as it could be done; that the Washington County branch was and in said ordinance was declared to be a part of the plaintiff in error; and that plaintiff in error should have the right to extend such branch to Austin by the most eligible route.

The new constitution, adopted in 1869, prohibited land grants to railroads.

In 1870 an act was passed declaring the Washington County Railroad to be a part of the plaintiff in error, and that plaintiff in error should have the right to build from Brenham to Austin, and other branch lines. It completed building to Austin and completed the specified part of its main line all within the times limited by the Act of 1870 as a condition of the continuance of the right to land grants secured to it by previous legislation.

The question presented to this Court was the company's right to land, earned upon its construction from Brenham to Austin.

> Chief Justice FULLER said: "The State courts have applied to the road from Brenham to Austin the same rule laid down as to new lines authorized to be constructed for the first time after the constitution of 1869 was adopted. We cannot concur in this view, but, on the contrary, are of the opinion that the constitutional provision as thus enforced impairs the obligation of the contract between the State and the company and cannot be sustained."

He then shows (p. 257) that at the time the constitutional provision was adopted the company had acquired the Washington County Railroad, with the right to extend from Brenham to Austin by the most eligible route; that it had completed and had in operation five sections of its main line and through its acquisition of the Washington County Railroad, so much of its branch towards Austin as extended from Hempstead to Brenham.

> "Thus it is seen," he says at p. 257, "that the company had been granted 16 sections of land per mile for the construction of the Austin branch as well as of the main line; *that it had accepted the grant, and had commenced to earn it, and had acquired the right to earn it*

> *by the construction of an important part of the line which the State, by the grant, intended to promote before the adoption or acceptance of the constitution of 1869.* The company had not merely organized and commenced the work it was incorporated to carry on, but had completed a large part of it."

The State court held that the line from Brenham to Austin was an independent enterprise authorized for the first time by the act of August 15th, 1870; and being a new and additional line, no land grant could be claimed for it because the constitutional provision was then in force. *Held,* error.

The ordinances of the constitutional convention of 1868 were of themselves incapable of accomplishing anything (following State court decisions); yet their ratification by the Act of 1870 removed all objection to their validity.

VI.

The provisions of the State Constitution of 1895 which declares that all lands within the limits of the Forest Preserve then owned or thereafter acquired by the State should be forever kept as wild forest lands and should not be leased, sold or exchanged or be taken by any corporation, public or private, and that the timber thereon should not be removed or destroyed, cannot defeat or impair the obligation of the State to this plaintiff in error.

The constitutional provisions referred to will be found in section seven of article seven of the State Constitution which went into effect on January 1st, 1895 (Appendix to Brief, p. 2). They were taken substantially without change from a theretofore existing statute, forming a part of the general forest legislation of the State which commenced in 1885 (See Appendix to Brief, pp. 37-49).

If what we have urged in the preceding parts of this brief be sound, namely, that the State was powerless by any legislation to defeat our vested right to construct, maintain and operate our road in accordance with the grants of 1863, 1865, etc., then the proposition at the head of this point is equally sound. For it is not the question as to whether the State of New York is speaking through its legislature or through its organic law, that determines the breach of faith,—that impairs the obligation of the contract,—but whether the effect of its speaking or acting in either form destroys, without notice and without compensation, a vested right of property theretofore granted by it.

But the proposition is too well settled to call for further argument. See

Houston, etc., Railway v. *Texas* (170 U. S., 243).
Edwards v. *Kearzey* (96 *id.*, 604).
Gunn v. *Barry* (15 Wall., 610).

VII.

The condemnation features of the Act of 1897 are unconstitutional and void.

Even if it were true that the State by condemning against the Indian River Company could defeat our right of way across the six-rod strip, still they have not yet done so; for the act under which they proceeded violates the safeguards secured by the Fourteenth Amendment and conferred upon the forest preserve board no authority whatsoever to act.

The material provisions of this act of 1897 have already been pointed out, and we have already stated our view as to wherein it fails to secure "due process of law,"—*that it denies to the person whose property is seized all opportunity to test the true nature of the alleged public use or the lawfulness of the taking.*

Here, too, it may be profitable to point out what we never questioned below,—although a reading of the opinion of the

learned Judge in the Court of Appeals might suggest the contrary,—that in an exercise of the sovereign power of eminent domain, be it by the State or by a corporation to which an exercise of that right is delegated, *the necessity and expediency of the taking are always within the discretion of the legislature and may not be reviewed by the courts.* But that does not mean that the courts are therefore deprived of all right to pass upon the *nature* of the use for which the property is taken. It is conceded that the legislature is wholly without power to take private property for a *private* use; and if the courts are by any act of the legislature denied all opportunity to review and to pass upon the question as to whether the alleged use is or is not a *public* one, a judicial function of government is usurped. The seriousness of such a result need not be commented upon here.

Government, it has been said, is simply the means of expressing the sovereign will; and we assent to such definition. But in the very nature of things it must refer to government *as a whole* and not to any single branch thereof to the exclusion of the other branches; and if the right be secured, as we insist it is, to every citizen of the United States that before he shall be forever deprived of his property for a use which the legislature may have *termed* a public use, he shall have an opportunity to present for the decision of a court of justice the question as to whether the use really is or is not a public one, then an act of the legislature which either directly or indirectly denies to a citizen such opportunity cannot be held to be valid.

In one more particular let us point out what our position is and has been throughout this case. We have never contended that the *time* when a citizen might review the legality of the taking of his property, bears in any way whatever upon the question of due process. So long as such right is in some form or other secured to him, it is immaterial whether he can exercise it before, at the time of or after the taking.

Nor is the kind of *notice* material,—whether personal or under certain conditions constructive. So long as an opportunity to test the lawfulness of the taking is given by or through the notice, the requirements of "due process" as demanded by the federal constitution are complied with.

These propositions seem elementary. And yet they were denied by the learned judge in the Court of Appeals who held, and unequivocally stated, that when sovereign New York exercises the right of eminent domain, the citizen is entitled to *no* notice and to *no* hearing,—except of course as to the question of damages, which we are not now discussing.

The "notice" which by section four of the act is to be served upon the owner is not the kind of notice he is entitled to, for it grants him no opportunity whatsoever to protect his rights against an unlawful exercise by the forest preserve board of the power which the act is supposed to confer. The Statute says (§4):

> "* * * The forest preserve board shall thereupon serve on the owner of any real property so appropriated a notice of the filing and the date of filing such description and containing a general description of the real property belonging to such owner which has been so appropriated; and from the time of such service, the entry upon and appropriation by the State of the real property described in such notice for the uses and purposes above specified shall be deemed complete, and thereupon such property shall be deemed and *be* the property of the State." (See Appendix to Brief, p. 50.)

It needs no argument to point out that this sort of notice secures no right to the owner, and really amounts to nothing more than the courtesy of a warning to him that he must not continue to exercise acts of ownership over what up to that moment he had rightly believed was his, on the pain of being held liable in trespass.

Perhaps, if the taking were by a municipal corporation or by some body politic which could be subsequently sued by the owner, the notice provided by this act *might* be held to give him the right to go into court and in a suit for trespass or in such other form of action as he might be advised, have his day in court as to the right or legality of the taking of his property. But the State is sovereign and cannot be sued except by its own gracious permission.

People v. *Dennison* (84 N. Y., 272, 283).
Locke v. *The State* (140 *id.*, 480).

Meigs v. *Roberts* (24 Misc., 668).
Reeside v. *Walker* (11 How., 290), and cases cited;

and *neither in the terms of this act nor elsewhere does the State permit an owner to test the legality of its action.* It seizes his property for an alleged public use without the slightest intimation of its intention so to do, and then arbitrarily says: You may go into the Court of Claims and prove the amount of the damages which our taking of your property has caused you, but you shall have no hearing whatever upon the question as to whether the use to which we intend to apply your land is or is not a public use, and no opportunity to test the legality of our action. We, the legislature, have assumed that the use is a public use, and you must abide by such assumption, whether we be right or wrong; we intentionally deny you all opportunity to be heard on that question or to test in anywise the legality of our action.

If the act contained an express provision that no owner whose land was taken under its terms, should ever be permitted to maintain as plaintiff any suit in any court to test the legality of the taking, no court would hesitate for a moment in declaring the act unconstitutional; and yet indirectly and by omission, instead of by express provision the act of 1897 declares that very thing.

The words of Justice JACKSON sitting at Circuit, in

Scott v. *City of Toledo* (36 Fed. Rep., 397),

seems to state the true rule.

> "The legislature," he says, "may prescribe the kind of notice and the mode in which it shall be given; *but it cannot dispense with all notice.* The owner must in some form, in some tribunal or before some official authorized to correct errors or mistakes, have an opportunity afforded him to be heard in respect to the proceeding under which his property is to be taken or burdened * * * in order to constitute such procedure due process of law."

Now, how does the learned judge below justify a taking by the State of private property for an *alleged* public use without

notice and without opportunity to test the legality of the taking? He puts it on three grounds:

(1.) That there is no necessity for any safeguard against the *taking*, because the right to take is all there is of the power of eminent domain and is necessarily conceded to exist when the existence of the power is admitted,—safeguards being necessary only when the question of compensation is reached (Record, p. 100).

(2.) That a public park has been frequently adjudged to be a public use and therefore (inferentially) there is nothing for the court to pass upon under this statute as to the nature of the use (Record, pp. 105-106); and

(3.) That all that "due process" requires is a method of procedure based upon long established usage in similar cases. And he points to the early acts in New York authorizing a taking of lands by the State for the purposes of the Erie Canal, as establishing what shall be due process when the State itself acts (Record, pp. 100-101).

1. No need of safeguards.

We have not that degree of confidence in the infallibility and integrity of public officials to warrant an unquestioning acquiescence in whatever they might elect to do under the provisions of the Act of 1897. It is not impossible to conceive that land be appropriated under the provisions of this act which as a matter of fact lay just outside the limits of the Adirondack Park as defined by law, but which through some error or conflict in surveys was believed in good faith by the Forest Preserve Board to lie wholly within such limits. The Board supposed it was acting within the scope of its authority when it seized the land, and yet as a matter of fact had no more right to take that property than it would to seize land in Great Britain. Yet the owner is deprived of his property, and *the legality of the taking can never be questioned.*

Is that the "due process of law" guaranteed by the federal constitution? Can a citizen be thus deprived of his property under a legislative claim of right and at the same time be denied by that legislature all opportunity, as well after as before

such taking, of proving or disproving in judicial proceedings the existence of a *fact* upon which the legality of the taking depends?

2. A PUBLIC PARK IS ALWAYS A PUBLIC USE.

To maintain the position here asserted by the learned Judge is to give judicial sanction to the proposition that in some instances the legislature *may* usurp the judicial functions of government, and in those cases deny to a citizen whose property it would take, that "due process of law" which otherwise and in cases where the character of the proposed use might be more involved, the citizen would concededly be entitled to. The constitutionality of an act cannot be determined by any such considerations. The test is always not what has been done, but what may or may not be done under an act of the legislature.

The cases cited by the learned Judge in support of his proposition that a public park is a public use, are authorities simply as establishing that the use in each of *those* cases, was a public use. How can an adjudication in the *Shoemaker* case, for instance (*Shoemaker* v. *U. S.*, 147 U. S., 282, 297), that lands taken for the Rock Creek Park in the District of Columbia were taken for a public use, be *conclusive* upon every citizen of the State of New York that anything the forest preserve board may seek to condemn under the asserted authority of the Act of 1897, is taken for a public use? And yet, although it seems absurd to say so, that is precisely the effect which the learned Judge below would give to the cases he cited.

The proposition for which we contend may be stated thus: The legislature has no power to say 'What we choose to call a park is a public use, and no one shall be permitted to question it'; and yet that is exactly what this act of 1897 does, as construed by the Court of Appeals. The legislature has ample right to take private property for a park; but whether what it terms a park is really a park and therefore a public use, or is taken for some private use under the guise of a taking for a park, an owner should always have the right to inquire.

We need not dispute for the purposes of this case the law of

Waterloo Company v. *Shanahan* (128 N. Y., 357-360),

which holds that while the court always has the power to deter-

mine whether or not a proposed use is public, and that a declaration by the legislature on such point is *not* conclusive, still the scrutiny of the courts must be confined to matters appearing on the face of the bill itself and to things that are the subject of judicial notice, and that it cannot institute an inquiry concerning the motives and purposes of the legislators in enacting the measure in order to show that under the guise of a pretended public use they were corruptly or otherwise seeking to take private property for a private use.

But we do insist, conceding all this, that an act which precludes a citizen from submitting even its terms to a judicial scrutiny, is a usurpation by the legislature of a judicial function and deprives a citizen of his property without due process of law.

3. An established usage defines "due process."

We think the learned Judge entirely misapprehended the extent to which custom or usage may be made the standards of "due process of law," and furthermore failed to scan closely the evidence of the so-called usage upon which he relied,—the matter of the Erie Canal.

In *Murray's Lessees* v. *Hoboken Land Co.* (18 How., 272, 277), Mr. Justice Curtis considered the meaning of "due process" from its origin as "law of the land" in Magna Carta, and said:

> "To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be two-fold. *We must examine the constitution itself to see whether this process be in conflict with any of its provisions.* If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

This certainly seems a more thoughtful consideration of the true meaning and effect of this much adjudged and still unde-

fined phrase, "due process of law," than that accorded it by the learned Judge below. Certainly if we apply to the Act of 1897 the tests prescribed by Mr. Justice CURTIS, we find at the very outset that it *does* conflict with other provisions of the constitution,—as we have already shown,—and that fact in itself condemns the act as falling short of the due process guaranteed.

And then as to usage: Can it be said that that which was done under the Canal Act of 1817, (assuming such act ever to have been adjudged constitutional on this point), was the usage or custom whereby sovereign New York should exercise its right of eminent domain, that the people had in mind as constituting "due process of law," when they embodied that phrase in their constitution of 1846? Is it not more rational to believe that the provision was borrowed from the Fifth Amendment to the Constitution of the United States, and carried with it whatever meaning the words possessed when such Fifth Amendment was adopted?

But even if we are wrong in this, we still submit, with the utmost deference to the learned judge below, that the decisions do not support his assertion as to frequent or indeed *any* adjudication on the constitutionality of the canal acts, if he thereby means, as his opinion would indicate, the constitutionality of the procedure whereby the State may lawfully take without any opportunity whatsoever to the owner, to test the legality of the taking. He says (Record, p. 101):

> "All the canals of the State were built under these acts, and much property of great value was appropriated solely under their provisions. For many years the powers thus conferred were in constant exercise, and although these statutes were often before the courts, not one was ever declared unconstitutional because of the summary method authorized in appropriating property. There was neither hearing nor notice, for the canal commissioners, or their agents, simply took possession of and used 'all lands, streams and waters' which they deemed necessary for the use of the canals. This completed the condemnation, except that the damages when ascertained were paid by the State. Under some of the acts, if the property owners filed their claims within one year after the appropriation, they received the amount

awarded by the appraisers; and unless they filed their claims within the period mentioned, they received nothing in the absence of special legislation. Adjudications made many years ago, and acquiesced in ever since, *sustained, some directly and others indirectly, the constitutionality of this legislation,* and without further discussion we hold that the statute under consideration is not unconstitutional because it does not provide for condemnation by due process of law. (*Wheelock* v. *Young,* 4 Wend, 647; *Jerome* v. *Ross,* 7 Johns. Ch., 315; *Rogers* v. *Bradshaw,* 20 Johns., 735.)"

We have found that these canal acts were often before the courts, as stated by the learned judge, and we have carefully studied over *two hundred* reported cases,—all we could find,—in which they were in some form or other up for adjudication. *In not a single instance was the question ever decided or, so far as we could perceive, even presented as to whether the acts were valid or invalid because they failed to provide for any opportunity for a hearing as to the legality of the taking.* On the features awarding compensation, as to whether specified parts of the soil could be seized, as to whether mere contractors could exercise the right of entry and appropriation under the protection of the statute, and kindred questions, were frequently before the courts; and the acts were invariably sustained. But that is very different from the position for which the learned judge has written, namely, that the legality of those features of the canal acts which resemble the condemnation features of the act of 1897, have been sustained by numberless adjudications, and that *therefore* when the State seeks to exercise the right of eminent domain, due process does not require that the owner shall be heard as to the legality of the taking.

But suppose after all that he were right, and that an unbroken line of decisions of the highest Court of the State of New York had uniformly held as the learned judge has held in the opinion now under review. What of it? Under the cases already noted, those decisions are not binding upon this Court which has invariably held that due process of law requires a hearing before it shall finally condemn.

See

McMillen v. *Anderson* (95 U. S., 37).
Davidson v. *New Orleans* (96 *id.*, 97).
Huling v. *Kaw Valley R. R.* (130 *id.*, 559).
Boom Co. v. *Patterson* (98 *id.*, 406).
U. S. v. *Jones* (109 *id.*, 513).
Kentucky Railroad Tax Cases (115 *id.*, 332).
State Railroad Tax Cases (92 *id.*, 575).
Spencer v. *Merchant* (125 *id.*, 356).
Castillo v. *McConnico* (168 *id.*, 674, 680).
Williams v. *Supervisors* (122 *id.*, 154, 164).
Pittsburgh Ry. v. *Backus* (154 *id.*, 421).
Holden v. *Hardy* (169 *id.*, 389).
Lawton v. *Steele* (152 *id.*, 137).
Bellingham Co. v. *New Whatcom* (172 *id.*, 318).
Hagar v. *Reclamation Dist. No. 108* (111 *id.*, 701).
Hurtado v. *California* (110 *id.*, 516, 536).
Windsor v. *McVeigh* (93 *id.*, 274, 279).

And that the law is really the same in New York, see

Rensselaer R. R. v. *Davis* (43 N. Y., 146).
People v. *Supervisors* (70 *id.*, 234).
People v. *Turner* (117 *id.*, 236),

and the very able opinion of Judge EARL in the widely followed case of

Stuart v. *Palmer* (74 N. Y., 183).

VIII.

The judgment should be reversed and the cause should be remanded with instructions to the Court of Appeals to direct the entry of final judgment in this action in favor of the plaintiff in error, upon the stipulation for judgment absolute given by the defendants in error.

Respectfully submitted,

R. Burnham Moffat,

Counsel for Plaintiff in Error.

January, 1900.

Supreme Court of the United States,

OCTOBER TERM, 1899.

No. 439.

THE ADIRONDACK RAILWAY COMPANY,
Plaintiff in Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendants in Error.

APPENDIX TO BRIEF

FOR PLAINTIFF IN ERROR, CONTAINING THE CONSTITUTIONAL AND STATUTORY PROVISIONS OF THE LAW OF NEW YORK APPLICABLE TO THE QUESTIONS INVOLVED HEREIN.

R. BURNHAM MOFFAT,
Counsel for Plaintiff in Error.

LIVINGSTON MIDDLEDITCH CO., 65 DUANE ST., N. Y.

Constitutional Provisions.

ARTICLE I.

§1. No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers. (*Based on provisions of §13 of Constitution of 1777; taken from Constitution of 1846.*)

§6. No person shall * * * be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation. (*Taken from Constitution of 1846.*)

§7. When private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited. General laws may be passed permitting the owners or occupants of agricultural lands to construct and maintain for the drainage thereof, necessary drains, ditches and dykes upon the lands of others, under proper restrictions and with just compensation, but no special laws shall be enacted for such purposes. (*Taken from Constitution of 1846.*)

§10. The people of this state, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the state; and all lands the title to which shall fail, from a defect of heirs, shall revert, or escheat to the people. (*Taken from Constitution of 1846.*)

§12. All lands within this state are declared to be allodial, so that, subject only to the liability to escheat, the entire and

absolute property is vested in the owners, according to the nature of their respective estates. (*Taken from Constitution of 1846.*)

ARTICLE VI.

§9. After the last day of December, one thousand eight hundred and ninety-five, the jurisdiction of the Court of Appeals, except where the judgment is of death, shall be limited to the review of questions of law. * * * Except where the judgment is of death, appeals may be taken as of right to said court only from judgments or orders entered upon decisions of the Appellate Division of the Supreme Court finally determining actions or special proceedings, *and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance judgment absolute shall be rendered against them.* * * * (*New in 1895.*)

ARTICLE VII.

§7. The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed. (*New in 1895.*)

ARTICLE VIII.

§1. Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes and in cases where, in the judgment of the legislature the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed. (*Taken from Constitution of 1846.*)

General Corporation Legislation.

1 Revised Statutes, Chap. XVIII, Title 3, entitled "Of the General Powers, Privileges and Liabilities of Corporations,"

In force from 1852 to 1882 (Rev. Stats., 4th & 5th Editions).

§1. Every corporation, as such, has power:

1. To have succession by its corporate name for the period limited in its charter; and when no period is limited, perpetually.

2. To sue and be sued, complain and defend in any court of law or equity.

4. To hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter.

§2. The powers enumerated in the preceding section, shall vest in every corporation that shall hereafter be created, although they may not be specified in its charter, or in the act under which it shall be incorporated.

§8. The charter of every corporation that shall hereafter be granted by the legislature, shall be subject to alteration, suspension and repeal, in the discretion of the legislature.

Former General Railroad Legislation.

LAWS 1850, CHAP. 140.

AN ACT to authorize the formation of railroad corporations, and to regulate the same.

Passed April 2, 1850, "three-fifths being present."

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§1. Any number of persons, not less than twenty-five, may form a company for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property, or for the purpose of maintaining and operating any unincorporated railroad already constructed, for the like public use; and for that purpose may make and sign articles of association, in which shall be stated the name of the company; the number of years the same is to continue; the places from and to which the road is to be constructed, or maintained and operated; the length of such road as near as may be, and the name of each county in this state through or into which it is made, or intended to be made; the amount of the capital stock of the company, which shall not be less than ten thousand dollars for every mile of road constructed, or proposed to be constructed, and the number of shares of which said capital stock shall consist and the names and places of residence of thirteen directors of the company, who shall manage its affairs for the first year, and until others are chosen in their places. Each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in said company. On compliance with the provisions of the next section, such articles of association may be filed in the office of the secretary of state, who shall endorse thereon the day they are filed, and record the same in a book to be provided by him for that purpose; and thereupon the persons who have so subscribed such articles of association, and all persons who shall become stockholders in such company, shall be a corporation by the name specified in such articles of association, and shall possess the powers and privileges granted to corporations, and be subject to the provisions contained in title three of chapter eighteen of the first part of the Revised

Statutes, except the provisions contained in the seventh section of said title.

§13. In case any company formed under this act is unable to agree for the purchase of any real estate required for the purposes of its incorporation, it shall have the right to acquire title to the same, in the manner and by the special proceedings prescribed in this act.

§22. Every company formed under this act, before constructing any part of their road into or through any county named in their articles of association, shall make a map and profile of the route intended to be adopted by such company in such county, which shall be certified by the president and engineer of the company, or a majority of the directors, and filed in the office of the clerk of the county in which the road is to be made. The company shall give written notice to all actual occupants of the land over which the route of the road is so designated, and which has not been purchased by or given to the company, of the route so designated. Any party feeling aggrieved by the proposed location, may, within fifteen days after receiving written notice as aforesaid, apply to a justice of the supreme court, out of court, by petition, duly verified, setting forth his objections to the route designated; and the said justice may, if he considers sufficient cause therefor to exist, appoint three disinterested persons, one of whom must be a practical engineer, commissioners to examine the proposed route, and, after hearing the parties, to affirm or alter the same, as may be consistent with the just rights of all parties and the public; but no alteration of the route shall be made, except by the concurrence of the commissioner who is a practical civil engineer. The determination of the commissioners shall, within thirty days after their appointment, be made and certified by them, and the certificate filed in the office of the county clerk. Said Commissioners shall each be entitled to three dollars per day for their expenses and services, to be paid by the person who applied for their appointment; and if the proposed route of the road is altered or changed by the commissioners, the company shall refund to the applicant the amount so paid.

Former General Railroad Legislation.

§28. Every corporation formed under this act shall, in addition to the powers conferred on corporations in the third title of the eighteenth chapter of the first part of the Revised Statutes, have power,

1. To cause such examination and surveys for its proposed railroad to be made, as may be necessary to the selection of the most advantageous route; and for such purpose, by its officers or agents and servants, to enter upon the lands or waters of any person, but subject to responsibility for all damages which shall be done thereto.

2. To take and hold such voluntary grants of real estate and other property as shall be made to it, to aid in the construction, maintenance and accommodation of its railroad; but the real estate received by voluntary grant shall be held and used for the purposes of such grant only.

3. To purchase, hold and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad, and the stations and other accommodations necessary to accomplish the objects of its incorporation; but nothing herein contained shall be held as repealing, or in any way affecting the act entitled "An act authorizing the construction of railroads upon Indian lands," passed May 12, 1836.

4. To lay out its road not exceeding six rods in width, and to construct the same; and for the purposes of cuttings and embankments, to take as much more land as may be necessary for the proper construction and security of the road, and to cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided in this act for lands taken for the use of the company.

10. From time to time to borrow such sums of money as may be necessary for completing and finishing or operating their railroad, and to issue and dispose of their bonds for any amount so borrowed, and to mortgage their corporate property and franchises to secure the payment of any debt contracted by the company for the purposes aforesaid; and the directors of the company may confer on any holder of any bond issued for money borrowed as aforesaid, the right to convert the principal due or

owing thereon, into stock of said company, at any time not exceeding ten years from the date of the bond, under such regulations as the directors may see fit to adopt.

§48. The legislature may at any time annul or dissolve any incorporation formed under this act; but such dissolution shall not take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which shall have been previously incurred.

LAWS 1867, CHAP. 775.

AN ACT to amend an act entitled "An act to authorize the formation of railroad corporations, and to regulate the same," passed April second, eighteen hundred and fifty.

Passed April 25, 1867.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. If any corporation formed under an act entitled "An act to authorize the formation of railroad corporations, and to regulate the same," passed April second, eighteen hundred and fifty, shall not, within five years after its articles of association are filed and recorded in the office of the Secretary of State, begin the construction of its road, and expend thereon ten per cent. on the amount of its capital, or shall not finish its road and put it in operation in ten years from the time of filing its articles of association, as aforesaid, its corporate existence and powers shall cease.

LAWS 1874, CHAP. 240.

AN ACT to further amend an act, passed April twentieth, eighteen hundred and sixty-six, entitled "An act supplementary to the act entitled 'An act to authorize the formation of railroad corporations, and to regulate the same,'" passed April second, eighteen hundred and fifty.

Passed April 23, 1874; three-fifths being present.

Former General Railroad Legislation.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section five of chapter six hundred and ninety-seven of the laws of eighteen hundred and sixty-six, entitled "An act supplementary to the act entitled 'An act to authorize the formation of railroad corporations, and to regulate the same,'" passed April second, eighteen hundred and fifty, is hereby amended so as to read as follows:

§5. The continuance of any railroad corporation now existing, or hereafter to be formed under the laws of this State, may be extended beyond the time named for that purpose in its act or acts of incorporation, or in the articles of association of such corporation, by the filing in the office of the Secretary of State a certificate of consent to such extension, signed by the holders of two-thirds in amount of the stock held by the stockholders of such corporation, and in every case where such consent has been or shall be so filed, the term of existence of such corporation is hereby extended and declared to be extended for the period designated in such certificate, and each such corporation shall, during the period named in such certificate, possess and enjoy all the rights, privileges and franchises enjoyed or exercised by such corporation at the time such certificate was or shall be so filed. Each such certificate shall be proved or acknowledged by the individuals signing the same, before some officer authorized by law to take acknowledgments of deeds, and whenever such stock shall be owned or held by firms or copartnerships the execution of such certificate shall be acknowledged by one or more of such copartners; and it shall be the duty of the Secretary of State to record such certificate in the book kept in his office for the record of articles of association of railroad companies. A copy of such certificate and of the acknowledgment thereof, certified by the Secretary of State, shall be presumptive evidence of the truth of the facts therein stated.

§2. This act shall take effect immediately.

Legislation affecting reorganization of railroads.

LAWS 1873, CHAP. 469.

AN ACT relative to purchasers of the franchises and property of corporations, whose franchises and property shall have been sold by mortgage.

Passed May 9, 1873.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Whenever the franchises, privileges, easements, rights and liberties of any corporation, created by any act of the legislature of this State, or found and incorporated under or by virtue of any general act thereof, and empowered by said act to mortgage its property or franchises, and the property, estate and effects of any such corporation, have been heretofore, or may be hereafter, sold by virtue of any mortgage executed by such corporation; and whenever the purchaser or purchasers thereof shall have acquired title to the same, in the manner prescribed by law, such purchaser or purchasers may associate with him or them any number of persons; and upon making and filing articles of association, as prescribed by this act, such purchaser or purchasers and his or their associates, and their successors and assigns, being residents of this State, shall thereupon become and be a body politic and corporate, and may take and receive a conveyance of and shall thereupon succeed to, possess and exercise and enjoy all the rights, powers, franchises, privileges, easements, liberties, property, estate and effects of which the title shall have been acquired and conveyed as aforesaid.

§2. In case the said corporation, whose franchises, privileges, easements, rights, powers, liberties, property, estate and effects shall have been so sold as aforesaid, shall have been incorporated under or by virtue of the provisions of any general statute or statutes of this State for the formation of corporations, the certificate so to be made and filed shall be in the form of, and shall state and set forth the particulars which in and by such statute or statutes were required to be stated and set forth in the original certificate of incorporation or articles of association of the said corporation.

Legislation affecting reorganization of railroads.

§3. In case the corporation whose franchises, privileges, easements, rights, powers, liberties, property, estate and effects shall have been so sold as aforesaid shall have been created by any special act of incorporation, then, and in that case, said certificates so to be made and filed shall state and set forth the following particulars, namely:

1. The name of the body politic and corporate so to be formed as aforesaid.

2. The amount of the capital stock thereof, which shall not exceed the amount of the capital stock of the said former or pre-existing corporation authorized by law at the time of such sale as aforesaid, and the number of shares of which the said stock shall consist.

3. The title and time of the passage of the said original act creating the said former corporation, and any other act or acts relating thereto.

4. The number of the directors who shall manage the concerns of the said body politic and corporate, and the names of the first board of directors thereof, and who shall hold their office for one year and until others are chosen in their places.

§4. The said certificate shall be executed in duplicate and acknowledged before some officer competent to take acknowledgment of deeds. One of the said duplicates shall be filed in the office of the Secretary of State, and the other thereof shall be filed in the office of the clerk of the county in which the said corporation first mentioned in this act had its principal place of business. And thereupon the said body politic and corporate so formed as aforesaid shall exist for the time, and may and shall possess, exercise and enjoy, all the powers, privileges, rights, liberties, easements and franchises possessed by the said former corporation, and in the same manner, and to the same extent, and with the same force and effect as the same could have been exercised by the said former corporation, had not such sale as aforesaid been made.

§5. A copy of any articles of association filed in pursuance

of this act, and certified by the secretary of State and county clerk, with whom the same shall have been filed, or their deputies, to be a true copy of such articles and of the whole thereof, shall be received in all courts and places as legal evidence of the incorporation of the said body politic or corporate, so to be formed as aforesaid.

§6. This act shall take effect immediately.

LAWS 1874, CHAP. 430.

AN ACT to facilitate the reorganization of railroads sold under mortgage, and providing for the formation of new companies in such cases.

Passed May 11, 1874.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. In case the railroad and property connected therewith, and the rights, privileges and franchises of any corporation created under the general railroad law of this State, or existing under any special act of the Legislature thereof, shall be sold under or pursuant to the judgment or decree of any court of competent jurisdiction made to execute the provisions or enforce the lien of any deed or deeds of trust, or mortgage theretofore executed by such company, the purchasers of such railroad property and franchises, their grantees or assigns, or a majority of them, may become a body politic and corporate with all the franchises, rights, powers, privileges and immunities which were possessed before such sale by the corporation whose property shall have been sold as aforesaid, by filing in the office of the Secretary of State a certificate, duly executed under their hands and seals, and acknowledged before an officer authorized to take the acknowledgment of deeds, in which certificate the said persons shall describe by name and reference to the act or acts of the Legislature of this State under which it was organized, the corporation whose property and franchises they shall have acquired as aforesaid, and also the

court by authority of which such sale shall have been made, giving the date of the judgment or decree thereof, authorizing or directing the same, together with a brief description of the property sold, and shall also set forth the following particulars:

1. The name of the new corporation intended to be formed by the filing of such certificate.

2. The maximum amount of its capital stock, and the number of shares into which the same is to be divided.

3. The number of directors by whom the affairs of the said new corporation are to be managed, and the names and residences of the persons selected to act as directors for the first year after its organization.

And upon the due execution of such certificate and the filing of the same in the office of the Secretary of State, the persons executing such certificate and who shall have acquired the title to the property and franchises sold as aforesaid, their associates, successors and assigns, shall become and be a body politic and corporate by the name specified in such certificate, and shall become and be vested with, and entitled to exercise and enjoy, all the rights, privileges, and franchises which, at the time of such sale, belonged to or were vested in the corporation formerly owning the property so sold, and shall be subject to all the duties and liabilities imposed by the provisions of the act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty, and of the acts amendatory thereof, except so far as may be inconsistent herewith; and a copy of the said certificate, by the Secretary of State or his deputy, shall be presumptive evidence of the due formation of the new corporation therein mentioned; provided, always, that a majority of said persons shall be citizens and residents of this State.

§2. In case the persons organizing the new corporation to be formed, as provided in the first section of this act, shall have acquired title to the railroad property and franchises which may have been sold as in said section mentioned, pursuant to any plan or agreement for the readjustment of the respective inter-

ests therein of the mortgage creditors and stockholders of the company owning such property and franchises at the time of any such sale, and for the representation of such interests of creditors and stockholders in the bonds or stock of the new corporation to be formed, as mentioned in said section, the said new corporation shall be authorized and have the power to issue its bonds and stock in conformity with the provisions of such plan or agreement; and the said new corporation may, at any time within six months after its organization, compromise, settle or assume the payment of any debt, claim or liability of the former company, upon such terms as may be approved by a majority of the agents or trustees intrusted with the carrying out of the plan or agreement of reorganization aforesaid; and for the purposes of such plans and of such settlements, the said new corporation may and shall be authorized to establish preferences in respect to the payment of dividends in favor of any portion of its said capital stock, and to divide such stock into classes; provided, nevertheless, that nothing herein contained shall be held to authorize the issue of capital stock by the said new company to an aggregate amount exceeding the maximum amount of such stock mentioned in the certificate of incorporation.

§3. Every stockholder in any company, the franchises and property whereof shall have been sold as aforesaid, shall have the right to assent to the plan of readjustment and reorganization of interest pursuant to which such franchises and property shall have been purchased as aforesaid, at any time within six months after the organization of said new company, and by complying with the terms and conditions of such plan become entitled to his pro rata benefits therein according to its terms.

§4. Full power is hereby given to the railroad commissioners, corporate authorities or proper officials of any city, town or village, who may hold stock in any corporation, the property and franchises whereof shall be liable to be sold, as mentioned in the first section of this act, to assent to any plan or agreement of reorganization which provides for the formation of a new company, in conformity with this act, and the issue of stock

therein to the proper authorities or officials of said cities, towns or villages, in exchange for the stock of the old or former company by them respectively held at par, subject to the foregoing provisions of this act. And such railroad commissioners, corporate authorities or other proper officials, may assign, transfer or surrender the stock so held by them in the manner required by any such plan and accept in lieu thereof the stock issued by said new corporation in conformity therewith.

§5. This act shall take effect immediately.

LAWS OF 1876. CHAP. 446.

AN ACT to amend chapter four hundred and thirty of the laws of eighteen hundred and seventy-four, entitled "An Act to facilitate the reorganization of railroads sold under mortgage, and providing for the formation of new companies in such cases."

Passed June 2, 1876.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The first section of chapter four hundred and thirty of laws of eighteen hundred and seventy-four, entitled "An act to facilitate the reorganization of railroads sold under mortgage, and providing for the formation of new companies in such cases," is hereby amended so as to read as follows:

§1. In case the railroad and property connected therewith, and the rights, privileges and franchises of any corporation, except a street railroad company, created under the general railroad law of this State, or existing under any special or general act or acts of the Legislature thereof, shall be sold under or pursuant to the judgment or decree of any court of competent jurisdiction made or given to execute the provisions or enforce the lien of any deed or deeds of trust, or mortgage theretofore executed by any such company, the purchasers of such railroad property and franchises, and such persons as they may associate

with themselves, their grantees or assignees or a majority of them, may become a body politic and corporate, and as such may take, hold and possess the title and property included in said sale, and shall have all the franchises, rights, powers, privileges and immunities which were possessed before such sale by the corporation whose property shall have been sold as aforesaid, by and upon filing in the office of the Secretary of State, a certificate, duly executed under their hands and seals, and acknowledged before an officer authorized to take the acknowledgment of deeds, in which certificate the said persons shall describe by name and reference to the act or acts of the Legislature of this State under which it was organized, the corporation whose property and franchises they shall have acquired as aforesaid, and also the court by authority of which such sale shall have been made, giving the date of the judgment or decree thereof, authorizing or directing the same, together with a brief description of the property sold, and shall also set forth the following particulars:

1. The name of the new corporation intended to be formed by the filing of such certificate.

2. The maximum amount of its capital stock and the number of shares into which the same is to be divided, specifying how much of the same shall be common, and how much preferred stock, and the classes thereof, and the rights pertaining to each class.

3. The number of directors by whom the affairs of the said new corporation are to be managed, and the names and residences of the persons selected to act as directors for the first year after its organization.

4. Any plan or agreement which may have been entered into pursuant to the second section hereof.

And upon the due execution of such certificate, and the filing of the same in the office of the Secretary of State, the persons executing such certificate, and who shall have acquired the title to the property and franchises sold as aforesaid, their associates, successors and assigns, shall become and be a body politic and

corporate, by the name specified in such certificate, and shall become and be vested with, and entitled to exercise and enjoy, all the rights, privileges and franchises, which at the time of such sale belonged to, or were vested in the corporation, which last owned the property so sold, or its receiver, and shall be subject to all the provisions, duties and liabilities imposed by the act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty, and of the acts amendatory thereof, except so far as said provisions, duties and liabilities may be inconsistent herewith, and with the last named rights, privileges or franchises; and a copy of the said certificate, certified by the Secretary of State or his deputy, shall be presumptive evidence of the due formation of the new corporation therein mentioned, provided always that a majority of said persons shall be citizens and residents of this State. In the certificate so to be filed shall be inserted the whole of the plan or agreement in the next section referred to. And such plan, agreement and articles may regulate voting by, and on the part of the holders of the preferred and common stock of said company, and may also allow, provide for and regulate voting at and in said meetings, and also for directors, by and on the part of the holders and owners of any or all of the bonds of the company foreclosed, or of the bonds, issued or to be issued, and payable by the new company, pursuant to any such plan, agreement or articles; such right of voting by bondholders to be in such manner, for such period or periods, and upon such conditions as said articles may authorize and declare; but such articles shall contain suitable provisions for such bondholders voting by proxy. Said articles shall not be inconsistent with the Constitution or laws of this State, and shall be binding upon the company until changed as therein provided for, or until otherwise provided by law.

§2. The second section of the said act is hereby amended so as to read as follows:

§2. In case the persons organizing or whose duty it may be to organize the new corporation to be formed as provided in the first section of this act, shall have acquired title to the rail-

road property and franchises which may have been sold as in said section mentioned, pursuant to any plan or agreement for or in anticipation of the readjustment of the respective interests therein of the mortgage creditors and stockholders of the company owning, or which last owned, such property and franchises at the time of any such sale, and for the representation of such interests of creditors and stockholders in the bonds or stock of the new corporation to be formed, as provided for in said section, the said new corporation shall be authorized and shall have the power to issue its bonds and stock in conformity with the provisions of such plan or agreement; and the said new corporation may, at any time within six months after its organization, compromise, settle or assume the payment of any debt, claim or liability of the former company, upon such terms as may be lawfully approved by a majority of the agents or trustees intrusted with the carrying out of the plan or agreement of reorganization aforesaid; and for the purposes of such plans and of such settlements, the said new corporation may and shall be authorized to establish preferences in respect to the payment of dividends in favor of any portion of its said capital stock, and to divide its said stock into classes; provided, nevertheless, that nothing herein contained shall be held to authorize the issue of capital stock by the said new company to an aggregate amount, exceeding the maximum amount of such stock mentioned in the certificate of incorporation.

1. And it shall be lawful for the Supreme Court to direct a sale of the whole of the property, rights and franchises covered by the mortgage or mortgages, or deeds of trust foreclosed at any one time and place to be named in the judgment or order, either in the case of the non-payment of interest only, or of both the principal and interest due and unpaid and secured by any mortgage or mortgages or deeds aforesaid.

2. Neither the said sale nor the formation of such corporation shall interfere with the authority or possession of any receiver of the property and franchises aforesaid, but he shall remain liable to be removed or discharged at such time as the court may deem proper.

3. No suit or proceeding shall be commenced against said receiver (unless founded on wilful misconduct or fraud in his trust), except such as shall be commenced before the expiration of sixty days from the time of the discharge of such receiver; but it is further provided, that after the expiration of said sixty days, the corporation that shall own or operate said railroad, shall be liable in any action that may be commenced against such company, and founded on any act or omission of such receiver (for which he may not as aforesaid be sued), and to the same extent as said receiver, but for this act, would be or remain liable, or to the same extent that such corporation would be, had it done or omitted the acts complained of against such receiver.

§3. This act shall take effect immediately.

LAWS 1889, CHAP. 236.

AN ACT to amend chapter four hundred and thirty of the laws of one thousand eight hundred and seventy-four, entitled "An act to facilitate the reorganization of railroads sold under mortgage and providing for the formation of new companies in such cases."

Became a law without the approval of the Governor, in accordance with the provisions of article four, section nine of the Constitution, May 6, 1889. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Chapter four hundred and thirty of the laws of one thousand eight hundred and seventy-four, entitled "An act to facilitate the reorganization of railroads sold under mortgage and providing for the formation of new companies in such cases," is hereby amended by adding thereto the following section, to be designated and numbered as section five, which shall read as follows:

§5. Nothing herein contained shall be construed to compel a corporation organized under this act to extend its road beyond the portion thereof constructed at the time said corporation ac-

quired title to such railroad property and franchise, provided the board of railroad commissioners of the State shall certify that in their opinion the public interests under all the circumstances do not require such extension. If said board shall so certify and shall file in their office such certificate (which certificate shall be irreversible by said board) said corporation shall not be deemed to have incurred any obligation so to extend its road and such certificate shall be a bar to any proceedings to compel it to make such extension or to annul its existence for failure so to do, and shall be final and conclusive in all courts and proceedings whatever. Nothing herein contained shall be construed to authorize the abandonment of that portion of a railroad which has been constructed and operated.

§2. Nothing herein contained shall apply to Kings county.

§3. This act shall take effect immediately.

General Railroad Law of 1890.

(Became a law June 7, 1890, taking effect May 1, 1891.)

§1. The chapter shall be known as the railroad law.

§4. Subject to the limitations and requirements of this chapter, every railroad corporation, in addition to the powers given by the general and stock corporation laws, shall have power:

1. To cause the necessary examination and survey for its proposed railroad to be made for the selection of the most advantageous route; and for such purpose, by its officers, agents or servants, to enter upon any lands or waters subject to liability to the owner for all damages done.

2. To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railroad; and to acquire by condemnation such real estate and property as may be necessary for such construction and maintenance in the manner provided by law, but the real property acquired by condemnation shall be held and used only for the purposes of the corporation during the continuance of the corporate existence.

3. To lay out its road not exceeding six rods in width, and to construct the same; and, for the purpose of cuttings and embankments, to take such additional lands as may be necessary for the proper construction and security of the road; and to cut down any standing trees that may be in danger of falling on the road, upon making compensation therefor. * * * *

§6. Every railroad corporation, except a street surface railroad corporation and an elevated railway corporation, before constructing any part of its road in any county named in its certificate of incorporation, or instituting any proceedings for the condemnation of real property therein, shall make a map and profile of the route adopted by it in such county, certified by the president and engineer of the corporation, or a majority of the directors, and file it in the office of the clerk of the county in which the road is to be made. The corporation shall give

written notice to all actual occupants of the lands over which the route of the road is so designated, and which has not been purchased by or given to it, of the time and place such map and profile were filed, and that such route passes over the lands of such occupants. Any such occupant or the owner of the land aggrieved by the proposed location, may, within fifteen days after receiving such notice, give ten days' written notice to such corporation and to the owners or occupants of lands to be affected by any proposed alteration, of the time and place of an application to a justice of the supreme court in the judicial district where the lands are situated, by petition duly verified, for the appointment of commissioners to examine the route. The petition shall state the objections to the route designated, shall designate the route to which it is proposed to alter the same, and shall be accompanied with a survey, map and profile of the route designated by the corporation, and of the proposed alteration thereof, and copies thereof shall be served upon the corporation and such owners or occupants with the notice of the application. The justice may, upon the hearing of the application appoint three disinterested persons, one of whom must be a practical civil engineer, commissioners to examine the route proposed by the corporation, and the route to which it is proposed to alter the same, and after hearing the parties, to affirm the route originally designated, or adopt the propsed alteration thereof, as may be consistent with the just rights of all parties and the public, including the owners or occupants of lands upon the proposed alteration; but no alteration of the route shall be made except by the concurrence of the commissioner who is a practical civil engineer, nor which will cause greater damage or injury to lands or materially greater length of road than the route designated by the corporation, nor which shall substantially change the general line adopted by the corporation. The commissioners shall, within thirty days after their appointment, make and certify their written determination, which with the petition, map, survey and profile, and any testimony taken before them, shall be immediately filed in the office of the county clerk of the county. Within twenty days after such filing, any party may, by written notice to the other appeal to the general term of the supreme court from the deci-

sion of the commissioners, which appeal shall be heard and decided at the next term held in the department in which the lands of the petitioners or any of them are situated, for which the same can be noticed, according to the rules and practice of the court. On the hearing of such appeal, the court may affirm the route proposed by the corporation or may adopt that proposed by the petitioner. The commissioners shall each be entitled to six dollars per day for their services, and to their reasonable and necessary expenses, to be paid by the person who applied for their appointment. If the route of the road, as designated by the corporation, is altered by the commissioners, or by the order of the court, the corporation shall refund to the petitioner the amount so paid, unless the decision of the commissioners is reversed upon appeal taken by the corporation. No such corporation shall institute any proceedings for the condemnation of real property in any county until after the expiration of fifteen days from the service by it of the notice required by this section. Every such corporation shall transmit to the board of railroad commissioners the following maps, profiles and drawings exhibiting the characteristics of their road, to wit: A map or maps showing the length and direction of each straight line; the length and radius of each curve; the point of crossing of each town and county line, and the length of line of each town and county accurately determined by measurements to be taken after the completion of the road.

Whenever any part of the road is completed and used, such maps and profiles of such completed part shall be filed with such board within three months after the completition of any such portion and the commencement of its operation; and when any additional portion of the road shall be completed and used, other maps shall be filed within the same period of time, showing the additional parts so completed. If the route, as located upon the map and profile filed in the office of any county clerk, shall have been changed, it shall also cause a copy of the map and profile filed in the office of the railroad commissioners, so far as it may relate to the location in such county, to be filed in the office of the county clerk. (Thus amended by L. 1892, ch. 676.)

General Railroad Law of 1880.

§7. All real property, required by any railroad corporation for the purpose of its incorporation, shall be deemed to be required for a public use. If the corporation is unable to agree for the purchase of any real property, or of any right, interest or easement therein, required for such purpose, or if the owner thereof shall be incapable of selling the same, or if after diligent search and inquiry the name and residence of such owner cannot be ascertained, it shall have the right to acquire title thereto by condemnation. * * * (Thus amended by L. 1892, ch. 676.)

§8. The commissioners of the land office may grant to any domestic railroad corporation any land belonging to the people of the state, except the reservation at Niagara and the Concourse lands on Coney Island, which may be required for the purposes of its road on such terms as may be agreed on by them; or such corporation may acquire title thereto by condemnation; and the county or town officers having charge of any land belonging to any county or town, required for such corporation for the purpose of its road, may grant such land to the corporation for such compensation as may be agreed upon.

§83. A railroad corporation, reorganized under the provisions of law, relating to the formation of new or reorganized corporations upon the sale of their property or franchise, shall not be compelled or required to extend its road beyond the portion thereof constructed, at the time the new or reorganized corporation acquired title to such railroad property and franchise, provided the board of railroad commissioners of the State shall certify that in their opinion the public interests under all the circumstances do not require such extension. If such board shall so certify and shall file in their office such certificate, which certificate shall be irreversible by such board, such corporation shall not be deemed to have incurred any obligation so to extend its road and such certificate shall be a bar to any proceedings to compel it to make such extension or to annul its existence for failure so to do, and shall be final and conclusive in all courts and proceedings whatever. This section shall not authorize the abandonment of any portion of a railroad which has been constructed and operated, or apply to Kings County.

General Condemnation Law of 1890.

(Chapter 95 of 1890.)

(Embodied in Code of Civil Procedure as Chapter 23 thereof.)

§3357. This title shall be known as the condemnation law.

§3358. The term "person," when used herein, includes a natural person and also a corporation, joint-stock association, the state and a political division thereof, and any commission, board, board of managers or trustees in charge or having control of any of the charitable or other institutions of the state; the term "real property," any right, interest or easement therein or appurtenances thereto; and the term "owner," all persons having any estate, interest or easement in the property to be taken, or any lien, charge, or incumbrance thereon. The person instituting the proceedings shall be termed the plaintiff; and the person against whom the proceeding is brought, the defendant. (Am'd by ch. 589 of 1896. In effect May 12, 1896.)

§3359. Whenever any person is authorized to acquire title to real property, for a public use by condemnation, the proceeding for that purpose shall be taken in the manner prescribed in this title.

§3360. The proceeding shall be instituted by the presentation of a petition by the plaintiff to the supreme court setting forth the following facts: * * *

§3369. Judgment shall be entered pursuant to the direction of the court or referee in the decision filed. If in favor of the defendant the petition shall be dismissed, with costs to be taxed by the clerk at the same rates as are allowed, of course, to a defendant prevailing in an action in the supreme court, including the allowances for proceedings before and after notice of trial. If the decision is in favor of the plaintiff, or if no answer has been interposed and it appears from the petition that he is entitled to the relief demanded, judgment shall be entered, adjudging that the condemnation of the real property described is necessary for the public use, and that the plaintiff is entitled to take and hold the property for the public use

specified, upon making compensation therefor, and the court shall thereupon appoint three disinterested and competent freeholders, residents of the judicial district embracing the county where the real property, or some part of it, is situated, or of some county adjoining such judicial district, commissioners to ascertain the compensation to be made to the owners for the property to be taken for the public use specified, and fix the time and place for the first meeting of the commissioners. * *
(Thus amended by L. 1895, ch. 530.)

§3371. Upon filing the report of the commissioners, any party may move for its confirmation at a special term, held in the district where the property or some part of it is situated, upon notice to the other parties who have appeared, and upon such motion, the court may confirm the report, or may set it aside for irregularity, or for error of law in the proceedings before the commissioners, or upon the ground that the award is excessive or insufficient. If the report is set aside, the court may direct a rehearing before the same commissioners, or may appoint new commissioners for that purpose, and the proceedings upon such rehearing shall be conducted in the manner prescribed for the original hearing, and the same proceedings shall be had for the confirmation of the second report, as are herein prescribed for the confirmation of the first report. If the report is confirmed, the court shall enter a final order in the proceeding, directing that compensation shall be made to the owners of the property, pursuant to the determination of the commissioners, and that upon payment of such compensation, the plaintiff shall be entitled to enter into the possession of the property condemned, and take and hold it for the public use specified in the judgment. Deposit of the money to the credit of, or payable to the order of the owner, pursuant to the direction of the court, shall be deemed a payment within the provisions of this title.

§3381. Upon service of the petition, or at any time afterwards before the entry of the final order, the plaintiff may file in the clerk's office of each county where any part of the property is situated, a notice of the pendency of the proceeding stating the names of the parties and the object of the proceeding,

and containing a brief description of the property affected thereby, and from the time of filing, such notice shall be constructive notice to a purchaser, or incumbrancer of the property affected thereby, from or against a defendant with respect to whom the notice is directed to be indexed, as herein prescribed, and a person whose conveyance or incumbrance is subseuqently executed or subsequently recorded, is bound by all proceedings taken in the proceeding after the filing of the notice, to the same extent as if he was a party thereto. The county clerk must immediately record such notice when filed in the book in his office kept for the purpose of recording notices of pendency of actions, and index it to the name of each defendant specified in the direction appended at the foot of the notice, and subscribed by the plaintiff or his attorney.

§3384. This title shall take effect on the first day of May, one thousand eight hundred and ninety, and shall not affect any proceeding previously commenced.

The Real Property Law.

CHAPTER 46 OF THE GENERAL LAWS.

Became a law May 12, 1896, taking effect October 1, 1896.

§207. *When written conveyance necessary.*—An estate or interest in real property, other than a lease for a term not exceeding one year * * * * cannot be created, granted, assigned, surrendered or declared unless by act or operation of law, or by a deed or conveyance in writing subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing. * * * *

Special Legislation affecting Adirondack Company.

LAWS 1863, CHAP. 236.

AN ACT to encourage and facilitate the construction of a railroad along the valley of the upper Hudson into the wilderness in the northern part of this State, and the development of the resources thereof.

Passed April 27, 1863; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Albert N. Cheney may associate with him any number of persons, and make and file articles of association as prescribed by the act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty, for the purpose of constructing and operating a railroad from some point in the county of Saratoga up and along the valley of the upper Hudson into the wilderness in the northern part of this State; and when so organized such corporation shall have the rights and privileges given by said act and the acts amending the same, and be subject to the provisions thereof, except so far as the same are inconsistent with the provisions of this act.

§2. The said corporation, when so formed, may purchase, take and hold lands to the amount of one million of acres of lands in said wilderness in addition to the lands which it shall be authorized to take under the provisions of the said act, passed April second, eighteen hundred and fifty, and the acts amending the same; and all of said lands shall be free and exempt from all taxation until the twelfth day of September, eighteen hundred and eighty-three; but such exemption shall not extend or apply to the road bed or track of said corporation, nor to lands occupied or used for structures necessary to the working of its road, nor to any lands after the same shall be sold, or contracted to be sold by said corporation.

§3. The said corporation shall report annually, on the first Monday of January, to the State Engineer and Surveyor, the

quantity of lands sold by it, with a description thereof and the names of the grantees of said lands.

§4. The said corporation, when so formed, shall be authorized during the period of its charter to convert and prepare for market the natural products of the forest and to mine and prepare for market the iron and other ores and minerals upon its lands, and to transport, sell and dispose of the same.

§5. Unless said corporation shall construct and put in operation at least twenty-five miles of its road by the first day of December, eighteen hundred and sixty-four, and thirty-five additional miles of its road by the first day of December, eighteen hundred and sixty-six, and twenty-five additional miles of its road by the first day of December, eighteen hundred and sixty-eight, the said exemptions from taxation shall cease, and said corporation shall not be entitled to said exemptions, unless on or before the first day of January, eighteen hundred and sixty-four, it shall deposit with the Comptroller of this State, in his name of office, a State of New York or United States stock, bearing at least five per cent. interest, to the amount of twenty thousand dollars at par, to be held as security for the taxes on the lands aforesaid from the year eighteen hundred and sixty-three to eighteen hundred and sixty-eight inclusive, in case said corporation shall not construct and put in operation the portions of its road in this section mentioned, but in case such portions of said road shall be so constructed and put in operation as before mentioned, the said stock shall be retransferred to said company, and the said company until default shall be made in the conditions aforesaid, shall be authorized to collect and receive the interest which may from time to time become payable on the said stock so transferred to the Comptroller as aforesaid, and the said Comptroller shall give to the said company the requisite authority to receive such interest. But nothing in this act contained shall be construed to make the State liable to pay any county, town, school or highway tax upon any of said lands hereby exempted from taxation.

§6. The evidence of the construction and operation of the railroad mentioned in the fifth section of this act, shall be the

affidavit of the president, vice-president or chief engineer of said corporation, which shall be filed in the office of the State Engineer and Surveyor not more than ten days after the time limited for such construction.

§7. The said corporation shall not be required to finish its road and put it in operation, except as mentioned in the fifth section of this act, before the first day of January, eighteen hundred and seventy.

§8. This act shall take effect immediately.

LAWS 1865, CHAP. 60.

AN ACT to extend the time for the completion of the railroad of the Adirondack Company.
Passed February 28, 1865.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The several periods of time allowed to the Adirondack company, a corporation formed under and in pursuance of the act of April twenty-seventh, eighteen hundred and sixty-three, chapter two hundred and thirty-six, for constructing and putting in operation portions of the railroad of said company mentioned in the fifth section of said act, are hereby extended one year each; and said company, upon compliance with the terms of said fifth section as hereby modified, shall be entitled to all the rights, privileges and exemptions conferred by said act.

§2. This act shall take effect immediately.

LAWS 1865, CHAP. 250.

AN ACT to authorize the Adirondack Company to extend its railroad to Lake Ontario or River St. Lawrence, and to increase its capital stock.
Passed March 31, 1865.

Special Legislation, Adirondack Company.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The Adirondack Company is hereby authorized to amend its articles of association so as to enable it, under the general law, to extend its railroad to some point on Lake Ontario or River St. Lawrence, and to increase its capital stock to such an amount as may be necessary for that purpose, not to exceed five millions of dollars additional capital.

§2. This act shall take effect immediately.

LAWS 1868, CHAP. 718.

AN ACT to amend an act entitled "An act to encourage and facilitate the construction of a railroad along the valley of the Upper Hudson, into the wilderness in the northern part of this State, and the development of the resources thereof," passed April twenty-seventh, eighteen hundred and sixty-three, and for the relief of the Adirondack Company formed under said act.

Passed May 8, 1868; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The time allowed the Adirondack Company to construct the thirty-five miles of its road, mentioned in section five of chapter two hundred and thirty-six of the laws of eighteen hundred and sixty-three, is extended to the thirty-first day of December, eighteen hundred and seventy, and if said company shall construct one-third of said thirty-five miles of road in each of the years eighteen hundred and sixty-eight, eighteen hundred and sixty-nine and eighteen hundred and seventy, continuous by northward from the present northern extremity of the twenty-five miles of said road already constructed, it shall be relieved from all forfeitures imposed by said act, and shall be entitled to all the rights and privileges, exemptions and franchises granted by said act; but in case said company shall fail

to construct and complete by the thirty-first day of December, eighteen hundred and sixty-eight, one-third of said thirty-five miles of its road, northward from its present terminus, this act shall be of no force and effect, anything herein contained to the contrary notwithstanding.

§2. The twenty United States government bonds deposited with the Comptroller of the State, pursuant to section five of said act, shall remain in his hands as security for the taxes upon the lands mentioned in said act for the years eighteen hundred and sixty-three to eighteen hundred and seventy, inclusive, in case said corporation shall not complete said thirty-five miles of its road, as provided by the first section of this act; but in case said thirty-five miles of road shall be constructed, the said bonds shall be transferred to said company, and until default shall be made in the performance of the conditions aforesaid, said company shall be authorized to collect and receive the interest on said bonds, and the Comptroller shall give to said company the requisite authority to receive the said interest.

§3. The said company may construct a branch of its road from some point on its line between the north line of the town of Thurman in the county of Warren and the southerly line of the county of Essex, to connect with the Whitehall and Plattsburgh railroad, at some point in the county of Essex, and so much of said branch railroad as shall be constructed by said company, continuously northward from the main line of said company's road, shall be deemed a part of the thirty-five miles of the road required to be built by the first and second sections of this act, and of the eighty-five miles of said road required to be built by chapter two hundred and thirty-six of the laws of eighteen hundred and sixty-three.

§4. This act shall take effect immediately.

Special Legislation, Adirondack Company.

LAWS 1868, CHAP. 850.

AN ACT declaring certain lands not exempt from taxation, and providing for the payment of the taxes due thereon from the years eighteen hundred and sixty-three to eighteen hundred and sixty-eight inclusive.

Passed June 2, 1868; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The lands in the several counties of this State now or late belonging to the corporation authorized to be formed under chapter two hundred and thirty-six of the Laws of eighteen hundred and sixty-three, and which is now known as the Adirondack Railroad Company, and which, under said chapter two hundred and thirty-six of said Laws of eighteen hundred and sixty-three, under certain conditions, were declared to be exempt and free from all taxation until the year eighteen hundred and eighty-three, shall hereafter not be exempt from taxation, and the same are hereby declared to be subject to State, town, county, school and highway taxation, the same as other real property in this State, in case the provisions of section four are not complied with.

§2. The amount of twenty thousand dollars in the State of New York or United States stocks, which was deposited by said corporation with the Comptroller of this State as security for the taxes on their lands authorized to be held under said act, from the years eighteen hundred and sixty-three to eighteen hundred and sixty-eight inclusive, shall be held and retained by said Comptroller, and devoted to the payment of the State, county, town, school and highway taxes, which, but for the exemption under the provisions of said chapter two hundred and thirty-six of the Laws of eighteen hundred and sixty-three, would have been levied upon and collected out of said lands.

§3. The said Comptroller shall, within two months after this act shall take effect, ascertain the amount of State tax which

would have been assessed upon any and all of said lands from the years eighteen hundred and sixty-three to eighteen hundred and sixty-eight respectively; and also what amount of tax for county, town, school and highway purposes which ought respectively to have been assessed upon any or all of said lands, and that he make a report to the legislature, in order that such legislation may be had as may be necessary to secure the payment of such taxes out of such fund to the State, county and town officers who may be by law authorized to receive the same.

§4. This act shall take effect on the thirty-first day of December, eighteen hundred and sixty-eight, unless said company shall construct and complete twelve miles of its road, northward from its present terminus, in which case this act shall take effect on the thirty-first day of December, eighteen hundred and sixty-nine, unless said company shall construct and complete twelve miles more of its road, northward from its then present terminus, in which case this act shall take effect on the thirty-first day of December, eighteen hundred and seventy, unless the said company shall construct and complete eleven miles more of its road, northward from the then terminus, being the twenty-four miles above specified. And if the said company shall so construct said thirty-five miles as prescribed by this section, then said company shall be entitled to all the rights, privileges, exemptions and franchises granted by chapter two hundred and thirty-six of the laws of eighteen hundred and sixty-three.

LAWS 1871, CHAP. 857.

AN ACT to amend an act entitled, "An act to amend an act to encourage and facilitate the construction of a railroad along the valley of the upper Hudson into the wilderness, in the northern part of this State, and the development of the resources thereof," passed April twenty-seventh, eighteen hundred and sixty-three, and for the relief of the Adirondack Company, formed under said act, passed May eighth, eighteen hundred and sixty-eight.

Passed April 28, 1871; three-fifths being present.

Special Legislation, Adirondack Company.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section three of an act entitled "An act to amend an act to encourage and facilitate the construction of a railroad along the valley of the upper Hudson into the wilderness, in the northern part of this State, and the development of the resouces thereof," passed April twenty-seventh, eighteen hundred and sixty-three, and for the relief of the Adirondack Company, formed under said act, passed May eighth, eighteen hundred and sixty-eight, is hereby amended by striking out the following words, to wit: "and the southerly line of the county of Essex," and inserting in lieu thereof the following words, to wit: "and the north line of the town of Newcomb, in the county of Essex."

§2. This act shall take effect immediately.

Laws 1872, Chap. 864.

An Act to authorize the Adirondack Company to construct and operate a branch of its railroad from its main line to the north bounds of the State.
Passed May 31, 1872.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The Adirondack Company is hereby authorized to construct and operate a branch of its railroad, commencing at some point at its line between the south line of the town of Thurman, in the county of Warren, and the north line of the town of Newcomb, in the county of Essex, and running to the north bounds of this State, in either of the towns of Mooers or Champlain, in the county of Clinton.

§2. This act shall take effect immediately.

Special Legislation, Adirondack Company.

LAWS 1873, CHAP. 695.

AN ACT authorizing the Adirondack Company to build a branch railroad to the village of Caldwell.
Passed June 10, 1873.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The Adirondack Company is hereby authorized and empowered to build a branch railroad from their railroad in the town of Hadley to the village of Caldwell, at the head of Lake George, and to charge not to exceed one dollar for each passenger carried over such extension.

2. All the laws applicable to the said Adirondack Company's railroad are hereby made applicable to said extension.

3. This act shall take effect immediately.

Forest Legislation.

LAWS 1885, CHAP. 283.

AN ACT to establish a forest commission, and to define its powers and duties and for the preservation of forests.
Passed May 15, 1885; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. There shall be a forest commission which shall consist of three persons who shall be styled forest commissioners, and who may be removed by the governor for cause. The forest commissioners shall be appointed by the governor by and with the advice and consent of the Senate.

§7. All the lands now owned or which may hereafter be acquired by the State of New York, within the Counties of Clinton, excepting the towns of Altona and Dannemora, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan, shall constitute and be known as the forest preserve.

§8. The lands now or hereafter constituting the forest preserves shall be forever kept as wild forest lands. They shall not be sold, nor shall they be leased or taken by any person or corporation, public or private.

§9. The forest commission shall have the care, custody, control and superintendence of the forest preserve. It shall be the duty of the commission to maintain and protect the forests now on the forest preserve, and to promote as far as practicable the further growth of forests thereon. It shall also have charge of the public interests of the state, with regard to forest and tree planting, and especially with reference to forest fires in every part of the state. It shall have as to all lands now or hereafter included in the forest preserve, but subject to the provisions of this act, all the powers now vested in the commissioners of the land office and in the comptroller as to such of the said lands as are now owned by the state. The forest commission may, from time to time, prescribe rules or regulations

and may, from time to time alter or amend the same, affecting the whole or any part of the forest preserve, and for its use, care and administration; but neither such rules or regulations, nor anything herein contained shall prevent or operate to prevent the free use of any road, stream or water as the same may have been heretofore used or as may be reasonably required in the prosecution of any lawful business.

§25. Every railroad company whose road passes through waste or forest lands, or lands liable to be overrun by fires within this State, shall twice in each year cut and burn off or remove from its right of way all grass, brush or other inflammable material, but under proper care, and at times when the fires thus set are not liable to spread beyond control.

§26. All locomotives which shall be run through forest lands shall be provided, within one year from the date of this act, with approved and sufficient arrangements for preventing the escape of fire from their furnace or ash-pan, and netting of steel or iron wire upon their smoke-stack to check the escape of sparks of fire. It shall be the duty of every engineer and fireman employed upon a locomotive, to see that the appliances for the prevention of the escape of fire are in use and applied, as far as it can be reasonably and possibly done.

§27. No railroad company shall permit its employees to deposit fire-coals or ashes upon their track in the immediate vicinity of woodlands or lands liable to be overrun by fires, and in all cases where any engineers, conductors or trainmen discover that fences along the right of way, on woodlands adjacent to the railroad, are burning, or in danger from fire, it shall be their duty to report the same at their next stopping place, and the person in charge of such station shall take prompt measures for extinguishing such fires.

§28. In seasons of drought, and especially during the first dry time in the spring after the snows have gone and before vegetation has revived, railroad companies shall employ a sufficient additional number of trackmen for the prompt extinguishment of fires. And where a forest fire is raging near the

line of their road they shall concentrate such help and adopt such measures as shall most effectually arrest their progress.

§32. Fifteen thousand dollars is hereby appropriated out of any moneys in the treasury not otherwise appropriated, for the purposes of this act. And no liabilities shall be incurred by said forest commissioners in excess of this appropriation.

LAWS OF 1892, CHAP. 707.

AN ACT to establish the Adirondack park and to authorize the purchase and sale of lands within the counties including the forest preserve.

Approved by the Governor May 20, 1892. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§1. There shall be a state park established within the counties of Hamilton, Herkimer, St. Lawrence, Franklin, Essex and Warren, which shall be known as the Adirondack park, and which shall, subject to the provisions of this act, be forever reserved, maintained and cared for as ground open for the free use of the people for their health or pleasure, and as forest lands necessary to the preservation of the headwaters of the chief rivers of the state, and a future timber supply.

§2. For this purpose the forest commission shall have power, as herein provided, to contract for the purchase of land situated within the County of Hamilton; the towns of Newcomb, Minerva, Schroon, North Hudson, Keene, North Elba, St. Armand and Wilmington, in the county of Essex; the towns of Harrietstown, Santa Clara, Altamont, Waverly and Brighton, in the county of Franklin; the town of Wilmurt, in the county of Herkimer; the towns of Hopkinton, Colton, Clifton and Fine, in the county of St. Lawrence; and the towns of Johnsburg, Stony Creek and Thurman, in the county of Warren.

§3. In any case where lands are situated within the towns specified in section two, the purchase of which lands will, in the opinion of the forest commission, be advantageous to the state, but which can not, as shall appear to the satisfaction of the forest commission, be bought on advantageous terms, unless subject to leases or restrictions or to the right to remove certain timber as hereinafter mentioned, the forest commission may make a contract for the purchase of such lands, providing that the contract and the deed or deeds to be made in pursuance thereof shall be subject to such leases, restrictions or right. But no lands shall be so purchased subject to any right to remove hard wood timber, or any trees of soft wood with a diameter of less than ten inches at the height of three feet from the ground, or subject to any rights, leases or restrictions, or the right to remove any timber after the period of ten years from the date of the conveyance.

§4. The forest commission shall have power, from time to time, due notice having been given, to contract to sell and convey any portion of the lands within so much of the forest preserve as is now or hereafter may be situated within the counties of Clinton, Fulton, Lewis, Oneida, Saratoga, Washington, St. Lawrence, Franklin (except the town of Harrietstown), Herkimer (except the town of Wilmurt), Essex (except the towns of Newcomb and North Elba), the town of Hope, in the county of Hamilton, and the county of Warren, (excepting, however, therefrom, all the islands in Lake George and all land upon the shore thereof), the ownership of which by the state is not, in the opinion of the forest commission needed to promote the purpose sought by this act, or by chapter two hundred and eighty-three of the laws of eighteen hundred and eighty-five. The proceeds of all such sales, as in this section provided, shall be paid to the treasurer of the state, and * * * *

§10. Except as in this act otherwise provided, the Adirondack park shall for all purposes, be deemed a part of the forest preserve. All laws for the protection of the forest preserve shall be applicable to the Adirondack park, except as in this act otherwise provided; and the forest commission may conduct the same prosecutions, and institute and maintain the same pro-

ceedings, which it is, or shall be, entitled to conduct, institute or maintain with reference to any portion of the forest preserve; and all acts forbidden upon the forest preserve are, and shall be deemed forbidden within the Adirondack park except as herein otherwise provided; and all violations of law upon the Adirondack park shall be subject to the same punishments and penalties as if such violation were committed upon any part of the forest preserve.

§14. This act shall take effect immediately.

LAWS OF 1893, CHAP. 332.

AN ACT in relation to the forest preserve and Adirondack park, constituting articles six and seven of chapter forty-three of the general laws.

Approved by the Governor April 7, 1893. Passed, three-fifths present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

ARTICLE VI.

FOREST PRESERVE.

§100. FOREST PRESERVE. The forest preserve shall include the lands now owned or hereafter acquired by the state within the counties of Clinton, except the towns of Altona and Dannemora, Delaware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan, except

1. Lands within the limits of any village or city and

2. Lands, not wild lands, acquired by the state on foreclosure of mortgages made to the commissioners for loaning certain moneys of the United States usually called the United States deposit fund.

Forest Legislation.

§101. Forest Commission. There shall be a forest commission consisting of five persons to be known as the forest commissioners, appointed by the governor by and with the advice and consent of the senate and holding office for the term of five years. * * * * * * *

§102. Powers and Duties. The forest commission shall:

1. Have the care, custody, control and superintendence of the forest preserve.

2. Maintain and protect the forests in the forest preserve and promote as far as practicable the further growth of the forest therein.

3. Have charge of the public interests of the state with regard to forestry and tree planting and especially with reference to forest fires in every part of the state.

4. Possess all the powers relating to forest preserve which were vested in the commissioners of the land office and in the comptroller on May fifteen, eighteen hundred and eighty-five.

* * * * * * * * *

§103. Sale of Timber on Forest Preserve. The forest commissioners may sell any spruce and tamarack timber, which is not less than twelve inches in diameter at a height of three feet above the ground, standing in any part of the forest preserve, and poplar timber of such size as the forest commission may determine and the proceeds of such sales shall be turned over to the state treasurer, by whom they shall be placed to the credit of the special fund established for the purchase of lands within the Adirondack park.

§107. Duties of Railroad Companies. Every railroad company whose road passes through waste or forest lands or lands liable to be overrun by fires within the state, shall twice in each year cut and remove from its right of way all grass, brush or other inflammable materials, but under proper care and at proper times when fire, if set, can be kept under control. All locomotives which run through forest lands shall be provided

with approved and sufficient arrangements for preventing the escape of fire from their furnaces or ashpans and with netting of steel or iron wire upon their smoke stacks to prevent the escape of sparks of fire and every engineer and fireman employed upon a locomotive shall see that the appliances to prevent the escape of fire are in use and applied as far as it can be reasonably and practically done. No railroad company shall permit its employes to deposit fire coals or ashes upon their track in the immediate vicinity of wood lands, or lands liable to be overrun by fires, and where any engineers, conductors or trainmen discover that fences or other material or substances along the right of way upon wood lands adjacent to the railroad are burning, or in danger from fire, they shall report the same at their next stopping place, and the person in charge of such station shall take prompt measures to extinguish such fires and shall immediately notify the nearest firewarden or forester. In seasons of drought and especially during the first dry time in the spring after the snows have gone and before vegetation has revived, railroad companies shall employ a sufficient number of trackmen for the prompt extinguishment of fires; and where a forest fire is raging near the line of their road, they shall concentrate such help and adopt such measures as shall most effectually arrest its progress. If any railroad company or any of its employes violate any provision of this section the company shall forfeit to the people of the state the sum of one hundred dollars for every such violation.

ARTICLE VII.

Adirondack Park.

§120. Adirondack Park. All lands now owned or hereafter acquired by the state within the county of Hamilton; the towns of Newcomb, Minerva, Schroon, North Hudson, Keene, North Elba, Saint Armand and Wilmington, in the county of Essex; the towns of Harrietstown, Santa Clara, Altamont, Waverly and Brighton, in the County of Franklin; the town of Wilmurt, in the county of Herkimer; the towns of Hopkington, Colton, Clifton and Fine, in the county of Saint Lawrence, and in the towns of Johnsburgh, Stony Creek, and

Thurman, and the islands in Lake George, in the county of Warren, except such lands as may be sold as provided in this article, shall constitute the Adirondack park. Such park shall be forever reserved, maintained and cared for as ground open for the free use of all the people for their health and pleasure and as forest lands, necessary to the preservation of the head-waters of the chief rivers of the state, and a future timber supply; and shall remain part of the forest preserve.

§121. Powers and Duties of Forest Commission. The forest commission shall have the care, custody, control and superintendence of the Adirondack park, and within the same and with reference thereto and to acts committed therein and to persons committing the same, all the control, powers, duties, rights of action and remedies belonging to such commission or the commissioners of the land office within and with reference to the forest preserve as to acts committed therein and persons committing the same. The forest commission shall have power:

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§126. Laws repealed. Of the laws enumerated in the schedule hereto annexed, that portion specified in the last column is repealed.

§127. When to take effect. This chapter shall take effect immediately.

Schedule of Laws Repealed.

Laws of	Chapter	Sections
* * * * * * * * *		
1885.	283.	All.
* * * * * * * * *		

Forest Legislation.

LAWS 1895, CHAP. 395.

AN ACT to amend the game law and to repeal chapter three hundred and thirty-two of the laws of eighteen hundred and ninety-three, entitled "An act in relation to the forest preserve and Adirondack park, constituting articles six and seven of chapter forty-three of the general laws."

Became a law April 25, 1895, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§1. The title to chapter four hundred and eighty-eight of the laws of eighteen hundred and ninety-two is hereby amended to read as follows:

"An act relating to game, fish and wild animals and to the forest preserve and Adirondack park, constituting chapter thirty-one of the general laws and to be known as the fisheries, game and forest law."

* * * * * * * * *

ARTICLE I.

FISHERIES, GAME AND FOREST COMMISSION.

§1. SHORT TITLE OF CHAPTER.—This chapter shall be known as the fisheries, game and forest law.

§2. FISHERIES, GAME AND FOREST COMMISSIONERS; HOW APPOINTED.—The governor shall appoint, by and with advice and consent of the Senate, five commissioners who shall constitute the board of fisheries, game and forest.

* * * * * * * * *

ARTICLE XII.

FOREST PRESERVE.

§270. FOREST PRESERVE.—The forest preserve shall include the lands owned or hereafter acquired by the State within the

counties of Clinton, except the towns of Altona and Dannemora, Deleware, Essex, Franklin, Fulton, Hamilton, Herkimer, Lewis, Oneida, Saratoga, St. Lawrence, Warren, Washington, Greene, Ulster and Sullivan, except

1. Lands within the limits of any village or city and

2. Lands, not wild lands, acquired by the State on foreclosure of mortgages made to the commissioners for loaning certain moneys of the United States, usually called the United States deposit fund.

§271. Powers and duties.—The board of fisheries, game and forest, shall:

1. Have the care, custody, control and superintendence of the forest preserve.

2. Maintain and protect the forests in the forest preserve, and promote as far as practicable the further growth of the forest therein.

3. Have charge of the public interests of the State with regard to forestry and tree planting, and especially with reference to forest fires in every part of the State.

4. Possess all the powers relating to forest preserve which were vested in the commissioners of the land office, and in the comptroller on May fifteen, eighteen hundred and eighty-five.

* * * * * * * * *

§275. Duties of railroad companies.—Every railroad company whose road passes through waste or forest lands or lands liable to be overrun by fires within the State, shall twice in each year cut and remove from its right of way all grass, brush or other inflammable materials, but under proper care and at proper times when fire, if set, can be kept under control. All locomotives which run through forest lands shall be provided with approved and sufficient arrangements for preventing the escape of fires from their furnaces or ashpans, and with netting of steel or iron wire upon their smoke stacks to prevent the escape of sparks of fire, and every engineer and fireman employed upon a locomotive shall see that the appliances to prevent the

escape of fire are in use and applied as far as it can be reasonably and practically done. No railroad company shall permit its employees to deposit fire coals or ashes upon their track in the immediate vicinity of woodlands, or lands liable to be overrun by fires, and where any engineers, conductors or trainmen discover that fences or other material or substances along the right of way upon woodlands adjacent to the railroad are burning, or in danger from fire, they shall report the same at their next stopping place, and the person in charge of such station shall take prompt measures to extinguish such fires, and shall immediately notify the nearest fire warden or fish and game protector and forester. In seasons of drought and especially during the first dry time in the spring after the snows have gone, and before vegetation has revived, railroad companies shall employ a sufficient number of trackmen for the prompt extinguishment of fires; and where a forest fire is raging near the line of their road they shall concentrate such help and adopt such measures as shall most effectually arrest its progress. If any railroad company or any of its employees violate any provision of this section the company shall forfeit to the pepole of the State the sum of one hundred dollars for every such violation.

ARTICLE XIII.

Adirondack Park.

§290. Adirondack Park.—All lands now owned or hereafter acquired by the State within the county of Hamilton; the towns of Newcomb, Minerva, Schroon, North Hudson, Keene, North Elba, Saint Armand and Wilmington, in the county of Essex; the towns of Harrietstown, Santa Clara, Altamont, Waverley and Brighton, in the county of Franklin; the town of Wilmurt, in the county of Herkimer; the towns of Hopkington, Colton, Clifton and Fine, in the county of Saint Lawrence, and the towns of Johnsburgh, Stony Creek, and Thurman, and the islands in Lake George, in the county of Warren; except such lands as may be sold as provided in this article, shall constitue the Adirondack Park. Such part shall be forever reserved, maintained and cared for as ground open for the free

use of all the people for their health and pleasure and as forest lands, necessary to the preservation of the headwaters of the chief rivers of the State, and a future timber supply; and shall remain part of the forest preserve.

§291. Powers and duties of forest commission.—The board of fisheries, game and forest shall have the care, custody, control and superintendence of the Adirondack park, and within the same and with reference thereto and to acts committed therein and to persons committing the same, all the control, powers, duties, rights of action and remedies belonging to such board or the commissioners of the land office within and with reference to the forest preserve as to acts committed therein and persons committing the same. The board of fisheries, game and forest shall have power:

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§295. * * *

5. Chapter three hundred and thirty-two of the laws of eighteen hundred and ninety-three, * * * and * * * are hereby repealed.

Forest Legislation.

Laws of 1897, Chap. 220.

AN ACT to provide for the acquisition of land in the territory embraced in the Adirondack park and making an appropriation therefor.

Became a law April 8, 1897, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The governor, within twenty days after this act takes effect, shall appoint from the commissioners of fisheries, game and forest and the commissioners of the land office, by and with the advice and consent of the senate, three persons to constitute a board to be known as "the forest preserve board." The members of such board may be removed by the governor at his pleasure. Vacancies shall be filled in like manner as an original appointment. The members of the board shall not receive any compensation for their services under this act, but shall receive their actual and necessary expenses to be audited by the comptroller. The board may employ such clerical and other assistants as it may deem necessary. The forest preserve board annually in the month of January shall make a written report to the governor showing in detail all its transactions under this act during the preceding calendar year.

§2. It shall be the duty of the forest preserve board and it is hereby authorized to acquire for the state, by purchase or otherwise, land, structures or waters or such portion thereof in the territory embraced in the Adirondack park, as defined and limited by the fisheries, game and forest law, as it may deem advisable for the interests of the state.

§3. The forest preserve board may enter on and take possession of any land, structures and waters in the territory embraced in the Adirondack Park, the appropriation of which in its judgment shall be necessary for the purposes specified in section two hundred and ninety of the fisheries, game and forest law, and in section seven of article seven of the constitution.

§4. Upon the request of the forest preserve board an accurate description of such lands so to be appropriated shall be made by the state engineer and surveyor, or the superintendent of the state land survey, and certified by him to be correct, and such board or a majority thereof shall indorse on such description a certificate stating that the lands described therein have been appropriated by the state for the purpose of making them a part of the Adirondack park; and such description and certificate shall be filed in the office of the secretary of state. The forest preserve board shall thereupon serve on the owner of any real property so appropriated a notice of the filing and the date of filing of such description and containing a general description of the real property belonging to such owner which has been so appropriated; and from the time of such service the entry upon and appropriation by the state of the real property described in such notice for the uses and purposes above specified shall be deemed complete, and thereupon such property shall be deemed and be the property of the state. Such notice shall be conclusive evidence of an entry and appropriation by the state. The forest preserve board may cause duplicates of such notice with an affidavit of due service thereof on such owner to be recorded in the books used for recording deeds in the office of the clerk of any county of this state where any of the property described therein may be situated, and the record of such notice and of such proof of service shall be evidence of the due service thereof.

§5. Claims for the value of the property taken and for damages caused by any such appropriation may be adjusted by the forest preserve board if the amount thereof can be agreed upon with the owners of the land appropriated. The board may enter into an agreement with the owner of any land so taken and appropriated, for the value thereof, and for any damages resulting from such appropriation. Upon making such agreement the board shall deliver to the owner a certificate stating the amount due to him on account of such appropriation of his lands, and a duplicate of such certificate shall also be delivered to the comptroller. The amount so fixed shall be paid by the treasurer upon the warrant of the comptroller.

§6. If the forest preserve board is unable to agree with the owner for the value of property so taken or appropriated, or on the amount of damages resulting therefrom, such owner, within two years after the service upon him of the notice of appropriation as above specified, may present to the court of claims a claim for the value of such land and for such damages, and the court of claims shall have jurisdiction to hear and determine such claims and render judgment thereon. Upon filing in the office of the comptroller a certified copy of the final judgment of the court of claims, and a certificate of the attorney-general that no appeal from such judgment has been or will be taken by the state, or, if an appeal has been taken a certified copy of the final judgment of the appellate court, affirming in whole or in part the judgment of the court of claims, the comptroller shall issue his warrant for the payment of the amount due the claimant by such judgment, with interest from the date of the judgment until the thirtieth day after the entry of such final judgment, and such amount shall be paid by the treasurer.

§7. The owner of land to be taken under this act may, at his option, within the limitations hereinafter prescribed, reserve the spruce timber thereon ten inches or more in diameter at a height of three feet above the ground. Such option must be exercised within six months after the service upon him of a notice of the appropriation of such land by the forest preserve board, by serving upon such board a written notice that he elects to reserve the spruce timber thereon. If such a notice be not served by the owner within the time above specified, he shall be deemed to have waived his right to such reservation, and such timber shall thereupon become and be the property of the state. In case land is acquired by purchase, the spruce timber and no other may be reserved by agreement between the board and the owner, subject to all the provisions of this act in relation to timber reserved after an appropriation of land by the forest preserve board. The presentation of a claim to the court of claims before the service of a notice of reservation, shall be deemed a waiver of the right to such reservation.

§8. The reservation of timber and the manner of exercising

and consummating such right are subject to the following restrictions, limitations and conditions:

1. The reservation does not include or affect timber within twenty rods of a lake, pond or river, and such timber cannot be reserved. Roads may be cut or built across or through such reserved space of twenty rods, under the supervision of the forest preserve board, for the purpose of removing spruce timber from adjoining land, and the reservation of spruce timber within such space shall be deemed a reservation by the owner, his assignee or representative, of the right to cut other timber necessary in constructing such road, but such reservation does not confer a right to remove such other timber so cut, or to use it otherwise than in constructing a road.

2. The timber reserved must be removed from the land within fifteen years after the service of notice of reservation, or the making of an agreement subject to regulations to be prescribed by the forest preserve board; but such land shall not be cut over more than once, and the said board may prescribe regulations for the purpose of enforcing this limitation. All timber reserved and not removed from the land within such time shall thereupon become and be the property of the state, and all the title or claim thereto by the original owner, his assigns or representatives, shall thereupon be deemed abandoned.

§9. A person who reserves timber as herein provided is not entitled to any compensation for the value of his land purchased or taken and appropriated by the state, nor for any damages caused thereby, until:

1. The timber so reserved is all removed and the object of the reservation fully consummated; or

2. The time limited for the removal of such timber has fully elapsed, or the right to remove any more timber is waived by a written instrument filed with the forest preserve board; and

3. The forest preserve board is satisfied that no trespass on state lands has been committed by such owner or his assigns or representatives; that no timber or other property of the state not so reserved has been taken, removed, destroyed or injured by him or them, and that a cause of action in behalf of the state

does not exist against him or them for any alleged trespass or other injury to the property or interests of the state; and

4. That the owner, his assignee, or other representative has fully complied with all rules, regulations and requirements of the forest preserve board concerning the use of streams or other property of the state for the purpose of removing such timber.

§10. A warrant shall not be drawn by the comptroller for the amount of compensation agreed upon between the owner and the forest preserve board, nor for the amount of a judgment rendered by the court of claims, until a further certificate by the board is filed with him to the effect that the owner has not reserved any timber or that he, his assignee, or other representative, has complied with the provisions of this act, or has otherwise become entitled to receive the amount of the purchase price, award or judgment.

§11. The forest preserve board may settle and adjust any claims for damages due to the state on account of any trespasses or other injuries to property or interests of the state, or penalties incurred by reason of such trespasses or otherwise, and the amount of such damages or penalties so adjusted shall be deducted from the original compensation agreed to be paid for the lands, or for damages, or from a judgment rendered by the court of claims on account of the appropriation of such land. A judgment recovered by the state for such a trespass or for a penalty shall likewise be deducted from the amount of such compensation or judgment.

§12. If timber is reserved upon land purchased or appropriated as provided by this act, interest is not payable upon the purchase price or the compensation which may be awarded for the value of such land or for damages caused by such appropriation, except as provided in section six.

§13. Persons entitled to cut and remove timber under this act may use streams or other waters belonging to the state within the forest preserve for the purpose of removing such timber, under such regulations and conditions as may be prescribed or imposed by the forest preserve board. The persons using such waters shall be liable for all damages caused by such use.

§14. If timber be reserved, its value at the time of making an agreement between the owner and the forest preserve board for the value of the land so appropriated and the damages caused thereby, or at the time of the presentation to the court of claims of a claim for such value and damages, shall be taken into consideration in determining the compensation to be awarded to the owner on account of such appropriation either by such agreement or by the judgment rendered upon such a claim.

§17. The forest preserve board shall take such measures as may be necessary or proper to perfect the title to any lands in the forest preserve now held by the state, and for that purpose may pay and discharge any valid lien or incumbrance upon such land, or may acquire any outstanding or apparent right, title, claim or interest which, in its judgment, constitutes a cloud on such title. The amounts necessary for the purposes of this section shall be paid by the treasurer upon the certificate of the board and the audit and warrant of the comptroller.

§19. When a judgment for damages is rendered for the appropriation of any lands or waters for the purposes specified in this act, and it appears that there is any lien or incumbrance upon the property so appropriated, the amount of such lien shall be stated in the judgment, and the comptroller may deposit the amount awarded to the claimant in any bank in which moneys belonging to the state may be deposited, to the account of such judgment, to be paid and distributed to the persons entitled to the same as directed by the judgment.

§21. Service of a notice by the forest preserve board under section four must be personal if the person to be served can be found in the state. The provisions of the code of civil procedure relating to the service of a summons in an action in the supreme court, except as to publication, apply, so far as practicable, to the service of such a notice. If a person to be served can not with due diligence be found in the state, a justice of the supreme court may, by order, direct the manner of such service, and service shall be made accordingly.

§22. The court of claims, if requested by the claimant or the attorney-general, shall examine the real property affected by the claim and take the testimony in relation thereto in the county where such property or a part thereof is situated. The actual and necessary expenses of each judge and of each officer of the court in making such examination and in so taking testimony shall be audited by the comptroller and paid from the money appropriated for the purposes of this act.

§23. The power to appropriate real property, vested in the forest preserve board by section four, is subject to the following limitations: Such real property must adjoin land already owned or appropriated by the state at the time the description and certificate are filed in the office of the secretary of state, except that timber land not so adjoining state land may be appropriated whenever in the judgment of the board timber thereon other than spruce, pine or hemlock is being cut or removed to the detriment of the forest, or the interests of the state.

§24. The sum of six hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated for the purposes specified in this act, out of any moneys in the treasury not otherwise appropriated. In addition to the amount above appropriated, the comptroller, upon the written request of the forest preserve board, is hereby authorized and directed to borrow, from time to time, not exceeding in the aggregate the sum of four hundred thousand dollars for the purposes specified in this act, and to issue bonds or certificates therefor payable within ten years from their date, bearing interest at a rate not exceeding five per centum per annum, and which shall not be sold at less than par. The sums so borrowed are hereby appropriated, payable out of the moneys realized from the sale of such bonds or certificates, to be expended under the direction of the forest preserve board for the purposes of this act, and to be paid by the treasurer on the warrant of the comptroller.

§25. All acts and parts of acts inconsistent with this act are hereby repealed.

§26. This act shall take effect immediately.